ONTARIO
LABOUR RELATIONS BOARD
REPORTS

January/February 2015

Ontario

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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Cited [2015] OLRB REP. JANUARY/FEBRUARY

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

CASES REPORTED

SUBJECT INDEX

an applicant seeking to withdraw a certification application under s. 128.1 – The Board found, reading sections 7(8), 7(9) and 128.1(21) together, that an application for certification may be withdrawn "upon such conditions as the Board may determine" regardless of whether the application is being dealt with under section 8 or section 128.1 – This power relates only to the certification application that is being withdrawn – The Board also draws a distinction between the powers in section 7(9) and in s. 111(2)(k): The power of the Board to bar an applicant from filing a subsequent application arises only from section 111(2)(k) when an application is dismissed and must be based on the circumstances that existed before and at the time of the dismissal – The power of the Board to refuse to entertain a subsequent application within a period of up to one year from the date an application is dismissed [section 111(2)(k)] or is withdrawn [section 7(9)] arises only after that subsequent application is made and must be based on the circumstances that existed before and at the time that subsequent application was made – Application withdrawn with leave of the Board

Bargaining Rights – Abandonment – Construction Industry – Sale of a Business – Trade Union – Following the commencement of substantial construction work at the Timmins Square Mall, the Carpenters filed a grievance alleging violations of the collective agreement and an application alleging a sale of business asserting bargaining rights with RioCan at the Mall –RioCan argued the Carpenters abandoned their bargaining rights either (a) prior to the legislative amendments in 1980; or (b) following visible substantial construction work in 2005/2006, during which time the Carpenters did not take action to protect their bargaining rights –The Carpenters had been certified as the bargaining agent for Campeau prior to 1978 – If bargaining rights were not abandoned prior to amendments to the Act in 1980, Campeau would have become bound to the Carpenters province-wide at that time – The Board held it was appropriate for it to examine the union's conduct after the legislative amendments in 1980 to determine whether the Carpenters had abandoned their bargaining rights – The Mall was sold several times over the two decades following 1978 – No remittance of dues or pension contributions were made by Campeau to the Carpenters at any time from 1977 to 1990, none of the collective agreements were renewed, and there was no evidence of other union activity – However, there was no evidence of failure to comply with the collective agreement, such as any construction work by Campeau that would otherwise be performed by members of the Carpenters – An absence of union activity does not establish abandonment when there is no evidence of construction activity – A union is not required to actively pursue its bargaining rights during periods where the employer is not operating in the geographic scope of the collective agreement – The Board found the Carpenters had not abandoned their bargaining rights prior to the legislative amendments in 1980 – When the next major construction work was performed at the Mall in 2005/2006, the work was subcontracted to both union and non-union subcontractors – RioCan argued the Carpenters were aware of the construction work being performed at the Mall and decided not to pursue their bargaining rights – However, the Carpenters clearly raised their objection to the work being performed outside the terms of the collective agreement when they filed a grievance against RioCan – When the Carpenters did not pursue the grievance or file an application claiming a sale of business, this would appear to be abandonment – However, the Board said it must weigh the entire context of the construction activity in 2005/2006: the Carpenters decided not to pursue their grievances because (a) the work was already largely being performed by their members through the sub-contractors; and (b) the Carpenters were pursuing province-wide bargaining rights in an ongoing sale of business

Certification – Construction Industry – Sector Determination – Status – The issue common to both certification applications was a sector determination involving construction of two condominium towers being built in conjunction with the restoration of a historic brick building for use as a restaurant – The employer only performed restoration work on the historical building which was to be joined with one condominium where the restaurant footprint would extend into ground floor – The union asserted it was one integrated project and as the majority of the work related to construction of condominiums, it was in the residential sector of the construction industry – The historic building contained control room with systems related to both building and condominiums – Certain piping and electrical services also passed between structures, however the only entrance to the restaurant was through the historic building and the elevators in the building did not service condominiums – Overall management of project was carried out by one developer and one architect on a single construction site under a common construction schedule – The Board noted there is no single test for determining sector, it is a fact-specific analysis and necessary to look at end-use of project, work characteristics, and bargaining patterns – Work characteristics and collective bargaining patterns were neutral – The Board noted real issue was the appropriate end-use of project – The Board had to determine whether it was a single integrated project with single end-use, or whether it had multiple and distinct components with more than one use – The Board noted promotional materials, press clippings and signage offered as evidence was of little assistance in sector determination – The Board found historical building had "no meaningful connection" to condominiums and restoration work was "inherently distinct" from new construction occurring on site – Although the project was carried out by a single developer, this did not change the fact that responsibility for restoration work was clearly severable from responsibility for residential construction – The Board found the overwhelming use of historic building was commercial and took place in industrial, commercial and institutional sector of construction industry – Declaration made

Certification – Construction Industry – The Board was asked to determine whether the work being performed by two individuals was "construction" or "maintenance" – The individuals were engaged in replacing a section of pipe (called the spool) in the processing of ore to extract gold – The actual work performed was identical to earlier replacements, with one exception: the rubber lined spool was being replaced by one with a ceramic lining – The evidence was clear that the spool itself is a wear part, which must be replaced on an ongoing basis in order to maintain the operation of the system; in the usual course, the replacement of the spool fits squarely within the definition of maintenance work – Was this an "alteration" within the meaning of the Act? – The applicant argued that money is one input into the system, and that by reducing this input the work made the system more efficient and therefore it "altered" the system – The Board disagreed: inputs into the system included things like raw ore, water, cyanide and electricity, but not money *per se* – The applicant could point to no authority to support the conclusion that the replacement of a wear part with a replacement that operates in precisely the same manner but simply lasts longer and ultimately costs less constitutes an alteration of the system – The work had to be done irrespective of the material used to line the spool and did not alter this primary purpose – Individuals were performing

Construction Industry – Certification – Practice and Procedure – LIUNA filed a certification application, electing to proceed under section 128.1, and a section 96 complaint a month later – In both the certification and ULP, the union asked for remedial certification, if necessary, under section 11 – In its certification application, LIUNA claimed there were four employees in the unit and that more than 55% of those employees were its members – When the employer filed a response claiming there were 10 employees in the unit, LIUNA challenged all 10 and sought to add three to the list – At the Case Management Hearing the parties agreed that the two files should be heard together, and whether the union could seek relief under section 11 in the proceedings would be dealt with by the panel hearing the merits (the response to the ULP was not due by the time of the CMH) – LIUNA moved to convert the s. 128.1 application so that it could be dealt with under section 8 and said that it did not want a vote, but was seeking the amendment to obtain remedial certification – The Board refused to allow the conversion, holding that the rationale for the request was LIUNA's concern that if a sufficient number of the employees on the employer's list were part of the bargaining unit, its support would fall below 40% – Such a conversion cannot be used for tactical reasons once a union has filed what was in its view a certification application with adequate support – Whether s. 11 remedial certification can be sought in the context of a s. 128.1 application remained an open issue – Matter continues

Construction Industry – Certification – Sector Determination – Status – The issue common to both certification applications was a sector determination involving construction of two condominium towers being built in conjunction with the restoration of a historic brick building for use as a restaurant – The employer only performed restoration work on the historical building which was to be joined with one condominium where the restaurant footprint would extend into ground floor – The union asserted it was one integrated project and as the majority of the work related to construction of condominiums, it was in the residential sector of the construction industry – The historic building contained control room with systems related to both building and condominiums – Certain piping and electrical services also passed between structures, however the only entrance to the restaurant was through the historic building and the elevators in the building did not service condominiums – Overall management of project was carried out by one developer and one architect on a single construction site under a common construction schedule – The Board noted there is no single test for determining sector, it is a fact-specific analysis and necessary to look at end-use of project, work characteristics, and bargaining patterns – Work characteristics and collective bargaining patterns were neutral – The Board noted real issue was the appropriate end-use of project – The Board had to determine whether it was a single integrated project with single end-use, or whether it had multiple and distinct components with more than one use – The Board noted promotional materials, press clippings and signage offered as evidence was of little assistance in sector determination – The Board found historical building had "no meaningful connection" to condominiums and restoration work was "inherently distinct" from new construction occurring on site – Although the project was carried out by a single developer, this did not change the fact that responsibility for restoration work was clearly severable from responsibility for residential construction – The Board found the overwhelming use of historic building was commercial and took place in industrial, commercial and institutional sector of construction industry – Declaration made

Construction Industry – Certification – The Board was asked to determine whether the work being performed by two individuals was "construction" or "maintenance" – The individuals were engaged in replacing a section of pipe (called the spool) in the processing of ore to extract gold – The actual work performed was identical to earlier replacements, with one exception: the rubber lined spool was being replaced by one with a ceramic lining – The evidence was clear that the spool itself is a wear part, which must be replaced on an ongoing basis in order to maintain the operation of the system; in the usual course, the replacement of the spool fits squarely within the definition of maintenance work – Was this an "alteration" within the meaning of the Act? – The applicant argued that money is one input into the system, and that by reducing this input the work made the system more efficient and therefore it "altered" the system – The Board disagreed: inputs into the system included things like raw ore, water, cyanide and electricity, but not money *per se* – The applicant could point to no authority to support the conclusion that the replacement of a wear part with a replacement that operates in precisely the same manner but simply lasts longer and ultimately costs less constitutes an alteration of the system – The work had to be done irrespective of the material used to line the spool and did not alter this primary purpose – Individuals were performing maintenance work; there were no employees at work in the construction industry – Application dismissed

Construction Industry – Certification – The OPDC sought to carve out an ICI sector bargaining unit of construction labourers from an existing ICI sector bargaining unit of masonry restoration employees represented by Local 598 – The matter turned on where there exists an overlap between the two relevant ministerial designations at issue – The OPDC asserted that the Board's previous decisions (*Clifford Restoration* and *S.S.T. Contracting*) were distinguishable because in both the applicant attempted to displace the entire bargaining unit of masonry restoration employees, whereas here they are only attempting to carve out their own designated trade (ICI sector construction labourers) from the broader unit – The Board notes that since 1978 a single trade, province wide bargaining scheme has been in place in the ICI sector and that this scheme was intended to reflect recognized traditional patterns of collective bargaining and trade union representation which had evolved over the years – This bargaining structure, which provides building trade unions with representational control of the trades or crafts that they have historically represented in the ICI sector, also limits the ability of any particular building trade union to represent workers in the ICI sector to those crafts or trades that it historically represented – With these purposes in mind, the Board continued that it was appropriate to strictly construe the ministerial designations in order to limit overlaps between them, that *Clifford* and *S.S.T. Contracting* had already found there was no overlap in the designations; that the Board agreed with these interpretations and that it did not make practical, labour relations sense to interpret the two designations as overlapping if a reasonable interpretation of those designations exists that is consistent with the underlying purposes of the Act – Accordingly the Board rejected the position asserted by the OPDC, since if there is no overlap it cannot matter whether the OPDC

Discharge – Delay – Health and Safety – Practice and Procedure – Reprisal – An employee, L, claimed the termination of his employment constituted a reprisal for his exercise of rights under the *Occupational Health and Safety Act* – SNC brought a preliminary motion that the Board exercise its discretion to decline to inquire into the application due to delay – Approximately one month after L's termination, L's counsel wrote to SNC alleging the discharge was a result of a workplace injury and a violation of the *Human Rights Code* because of L's age – An ESA claim was later filed, denied and appealed – In the course of proceedings related to the ESA appeal, L gained a better understanding of the various statutory regimes and filed the present application with the Board approximately 17 months after his termination – L asserted his initial notice to SNC of potential legal challenges to his termination rebutted any presumption of prejudice suffered by SNC due to delay –SNC asserted it suffered presumed and actual prejudice, and that L failed to provide a sufficient explanation for the delay – The Board's discretion to decline to inquire into a matter under section 50(3) of this Act is analogous to its discretion under section 96(4) of the *Labour Relations Act* and its approach is consistent – Where an application is filed more than six months after the events upon which it is grounded, the Board may decline to hear it where the responding party provides good reason why that should occur and the applicant does not provide a compelling explanation for the delay – Where an application is filed more than 12 months after the events upon which it is grounded, a presumption of prejudice arises and the applicant is required to rebut that presumption – Although SNC knew shortly after L's termination that L alleged his discharge was related to his age and to the fact that he had suffered a compensable workplace injury, those allegations are not actionable before the Board under either the ESA or the OHSA – There was no suggestion of reprisal until the present application was filed – SNC's approach to defending this application may or may not have been the same as its approach to proceedings in other forums, particularly because L's allegations were only ever raised in a forum (a claim under the ESA) where there was clearly no jurisdiction to entertain them – Further, where an applicant has proceeded in multiple forums the Board has often found such conduct favours declining to inquire into the matter so as not to encourage parties to engage in forum shopping – The Board could not determine that SNC's ability to defend the application had not been impaired – Further, in assessing prejudice the Board also considers how the impact of the requested relief has been affected by the delay and whether the employer has already had to defend its actions in other proceedings – The Board determined L had not rebutted the presumption of prejudice – Application dismissed

Employee – Collective Agreement – Construction Industry Grievance – The grievor was denied a subsistence allowance meant to compensate employees for the cost of securing accommodation when working at a site remote from their "regular residence" – A regular residence is defined as "…a self-contained, domestic establishment (a dwelling house, apartment or similar place of residence where a person generally eats and sleeps… in contrast to a boarding house facility which is not self-contained…" – The grievor lives in a one-room unit on the second floor of a former hotel – The unit is a private space accessed using a key – Inside the unit are all of the normal things associated with domestic life, save for a bathroom and shower, which are instead located adjacent to the unit and shared with the occupants of four other units – The grievor pays rent on a monthly basis, inclusive of utilities – All of the units on the first floor and all but five of the units on the second floor include their own bathrooms and showers – There are no shared kitchen facilities or common areas – The issue before the Board was whether or not the grievor's unit was self-contained – Hydro One asserted a unit is not self-contained unless all the elements of sleeping, eating, and bathroom facilities are included

3527-10-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. 955140 Ontario Inc. o/a **Pickard Construction**, Responding Party v. Northern Employees Association, Intervenor

Bar – Certification Application – Construction Industry – Practice and Procedure – At the request of the applicant the Board clarified its finding that it may impose conditions on an applicant seeking to withdraw a certification application under s. 128.1 – The Board found, reading sections 7(8), 7(9) and 128.1(21) together, that an application for certification may be withdrawn "upon such conditions as the Board may determine" regardless of whether the application is being dealt with under section 8 or section 128.1 – This power relates only to the certification application that is being withdrawn – The Board also draws a distinction between the powers in section 7(9) and in s. 111(2)(k): The power of the Board to bar an applicant from filing a subsequent application arises only from section 111(2)(k) when an application is dismissed and must be based on the circumstances that existed before and at the time of the dismissal – The power of the Board to refuse to entertain a subsequent application within a period of up to one year from the date an application is dismissed [section 111(2)(k)] or is withdrawn [section 7(9)] arises only after that subsequent application is made and must be based on the circumstances that existed before and at the time that subsequent application was made – Application withdrawn with leave of the Board

BEFORE: *Harry Freedman,* Vice-Chair

DECISION OF THE BOARD: February 17, 2015

1. In its decision dated February 4, 2015 in this construction industry certification application being dealt with under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") the Board noted that the applicant had advised the Board it was withdrawing this application. The Board had also noted that the applicant did not request leave of the Board to do so, and explained that the Board had the power under section 128.1 of the Act "to impose conditions on the withdrawal or it may permit the withdrawal of an application for certification with or without conditions."

2. The Board invited the parties' submissions before determining whether to permit the applicant to withdraw its application with or without conditions. The responding party and applicant both made submissions in accordance with the Board's February 4th decision. The intervenor made no submissions.

3. The applicant in its submissions seeks reconsideration of the Board's February 4th decision holding that the Board can impose conditions on an applicant seeking to withdraw a certification application being dealt with under section 128.1 of the Act. The applicant also maintains, in any event, the Board should permit its application to be withdrawn without any conditions being imposed.

4. The responding party submits that the Board ought to permit the applicant to withdraw this application but as a condition of doing so exercise its discretion under sections 128.1(21) and 7(9) of the Act and impose a bar on any subsequent application filed by the applicant within one year of the date of the decision granting leave to withdraw this application.

5. The applicant submits that the Board determined it had the power to impose conditions on an applicant withdrawing a certification application being dealt with under section 128.1 without giving the applicant an opportunity to make submissions on that issue. The applicant is correct. As the applicant did not have the opportunity to make submissions on that issue the Board is prepared to reconsider its decision and deal with the issue *de novo* after considering the parties' submissions.

6. The applicant in its submissions points out that section 7(8) of the Act provides:

> An application for certification may be withdrawn by the applicant upon such conditions as the Board may determine.

The applicant refers to section 128.1(21) which provides that section 7(9) "applies, with necessary modifications, if the trade union withdraws the application for certification". The applicant relies on the fact that section 7(8) is not referred to in section 128.1(21). It contends that section 128.1(21) when read together with section 7(9) only requires the Board to assess whether to refuse to consider a subsequent application for certification when that subsequent application is filed. It submits that as section 7(8) is not referred to in section 128.1, the applicant has a unilateral right to withdraw its certification application without the Board determining whether any conditions ought to be imposed on the applicant.

7. The applicant submits that the Act has developed two distinct regimes that deal with certification applications—one that applies to applications in the construction industry and the other that applies to applications that are not in the construction industry. It contends that the Board's power under section 7(8) to impose conditions arises only in relation to certification applications outside the construction industry at the point when an applicant seeks to withdraw its certification application whereas the Board's power to impose conditions on construction industry certification applications arises under section 128.1(21) only when a subsequent application is filed.

8. The applicant relies on a number of Board decisions applying that analysis. It refers to *Mady Development Corporation*, 2012 CanLII 56720 (ON LRB); *Lopes Mechanical Ltd.*, 2007 CanLII 13315 (ON LRB); *Direct Traffic Management Inc.*, 2014 CanLII 39805 (ON LRB); and *Huron Central Railway*, 2012 CanLII 15885 (ON LRB) as examples where the Board has used common language in its decisions permitting an applicant to withdraw its construction industry certification application

without leave of the Board and without conditions. In all those decisions, and according to the applicant in many others, the Board has explained its approach in the following way:

> Subsections 128.1(21) to (23) deal with the withdrawal of an application. There is no provision similar to subsection 7 (8) that requires the Board's consent to withdraw an application for certification. The act of withdrawal is a unilateral one the union is entitled to do at this point as of right. It is effective as of the date the applicant notified the Board of its desire to withdraw the application.

9. None of the decisions relied on by the applicant in support of its argument that the Board does not have the power to impose conditions on an applicant that seeks to withdraw a construction industry certification application made any reference to section 126.1 of the Act.

10. The Board in its February 4th decision in this matter explained why it held that the Board may impose conditions on a withdrawal of a certification application being dealt with under section 128.1 when it wrote at paragraphs 6 and 7:

> 6. Sections 128.1(21) to (23) of the Act deal with the withdrawal of an application for certification being dealt with under section 128.1. While there is nothing in section 128.1 comparable to section 7(8) that permits the Board to impose conditions on the withdrawal of a certification application, section 126.1(2) provides that sections 1 to 125 also apply to the construction industry. Section 126.1(3) ¶1 provides that if there is a conflict in applying provisions of the Act to the construction industry, sections 126 to 144 prevail over sections 7 to 63.
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> 7. There is no conflict between section 7(8) and sections 128.1. Therefore it appears to me that the Board has the power to impose conditions on the withdrawal or it may permit the withdrawal of an application for certification with or without conditions.

The applicant maintains there is a conflict between section 7(8) and sections 128.1(21) to (23) because the latter provisions do not empower the Board to impose conditions on a withdrawal while the former provision does.

11. In my view, there is no conflict between sections 7(8) and section 128.1. I also reject the applicant's submission that the Act through sections 8 and 128.1 has created

two distinct regimes for dealing with non-construction certification applications under section 8 and construction industry certification applications under section 128.1.

12. A construction industry certification application may be dealt with, at the election of the applicant, under either section 8 of the Act or under section 128.1. I accept that only a non-construction certification application may be dealt with under section 8 and cannot be dealt with under section 128.1. In other words, construction industry trade unions may elect to have their construction industry certification application dealt with either under section 128.1 or under section 8. Therefore a construction industry certification application can be dealt with under the same statutory regime applicable to certification applications outside the construction industry or can be dealt with under section 128.1. Simply put, the statutory regime for certification established by section 8 of the Act applies to both construction industry certification applications and certification applications outside the construction industry.

13. Moreover, sections 7(8) and 7(9) do not refer certification applications being dealt with under section 8. Section 7(8) simply refers to "an application for certification". An application for certification that the applicant elected to have dealt with under section 128.1 is, in my view, an application for certification within the meaning of section 7(8).

14. Section 128.1(21) makes explicit reference to section 7(9) being applicable to applications being dealt with under section 128.1 because section 7(9) is triggered "if the trade union withdraws the application before a representation vote is taken…". Since the Board does not order a representation vote in applications being dealt with under section 128.1 except in limited circumstances, the discretionary bar imposed by section 7(9) would not be applicable to certification applications being dealt with under section 128.1 unless section 7(9) was made applicable to it.

15. Section 7(8) applies regardless of whether the certification application is being dealt with under section 8 or section 128.1 because it refers to "an application for certification". Moreover, the applicant's argument that the Board can only impose conditions in relation to a subsequent certification application being dealt with under section 128.1 because section 7(8) is not referred to in section 128.1 does not, in my view, take into account that that same argument might be made in relation to an application being dealt with under section 8.

16. Sections 7(8), 7(9) and 128.1(21) must be read together. An application for certification may be withdrawn "upon such conditions as the Board may determine" regardless of whether the application is being dealt with under section 8 or section 128.1. That is, the Board has the power to impose conditions in relation to only the certification application that an applicant seeks to withdraw. Once the application is withdrawn and a subsequent application is made the provisions of section 128.1(21)

and section 7(9) become applicable and the Board can determine at the time the second application is made whether to refuse to consider that second application.

17. In the result, while the Board has undertaken reconsideration of its February 4th decision, the applicant's request to have the Board vary or revoke its February 4th decision and determine that the applicant has the right to withdraw this application without conditions is dismissed.

18. The responding party in its submissions contends that the Board has the power in this proceeding to impose a discretionary bar on the subsequent applications for certification filed by the applicant pursuant to the power set out in sections 128.1(21) and 7(9) of the Act.

19. The responding party points out that the applicant filed applications for certification on December 30, 2014 (Board File No. 2943-14-R) and February 5, 2015 (Board File No. 3295-14-R) for bargaining units that partially overlap with the bargaining unit to which this application relates. The bargaining unit that is the subject of this application is construction labourers employed in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in Board Areas 3, 6, 18 and 27. The bargaining unit to which the application in Board File No. 2943-14-R relates is construction labourers in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in Board Area 3. The bargaining unit to which the application in Board File No. 3295-14-R relates is construction labourers employed in all sectors of the construction industry in Board Area 3 other than the industrial, commercial and institutional sector. It contends that all three certification applications filed by the applicant currently pending before the Board affect construction labourers employed by the responding party in all sectors of the construction industry other than the industrial, commercial and institutional sector in Board Area 3 and that two of those three applications affect construction labourers employed by the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. It asserts the certification application "files are stacking up quickly and heavily."

20. The responding party submits that the purported withdrawal of this application was designed to allow the applicant to prevent the responding party from relying on section 111(3)(c) of the Act to move for the dismissal of those subsequent applications.

21. The responding party requests that the Board impose a bar on the applicant making further applications as a condition of the withdrawal of this application. It asserts that the Board has the power to impose conditions on the withdrawal of the application and "in this case the Board has the power to consider and, if it deems it appropriate, impose a discretionary bar to subsequent Applications pursuant to Section 128.1(21), which adopts Section 7(9) of the Act." The responding party has not

requested the Board impose any other conditions in relation to the withdrawal of this application.

22. The Board's power under section 7(8) allows it to impose conditions in relation to the withdrawal of the application for certification, which might include a refusal to permit the withdrawal and result in the Board dismissing the application. There is nothing explicit in section 7(8) that gives the Board the power to deal with a subsequent certification application filed by the same applicant, and in particular, there is nothing in section 7(8) or section 7(9) that permits the Board to "impose a bar" on an applicant that would preclude it from making a subsequent application.

23. Section 7(9) permits the Board to "refuse to consider another application for certification…until one year or such shorter period as the Board considers appropriate has elapsed after the application is withdrawn."

24. The language of section 7(9) may be usefully compared to section 111(2)(k) which provides that the Board has the power:

> to bar an unsuccessful applicant for any period not exceeding one year from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant…within any period not exceeding one year from the date of the dismissal of the unsuccessful application.

There is in my view an important and significant distinction between the "bar" power found in section 111(2)(k) and the power to refuse to entertain a subsequent application found in sections 7(9) and 111(2)(k). The power of the Board to bar an applicant from filing a subsequent application arises only from section 111(2)(k) when an application is dismissed and must be based on the circumstances that existed before and at the time of the dismissal. The power of the Board to refuse to entertain a subsequent application within a period of up to one year from the date an application is dismissed [section 111(2)(k)] or is withdrawn [section 7(9)] arises only after that subsequent application is made and must be based on the circumstances that existed before and at the time that subsequent application was made.

25. Although some of the decisions referred to by the applicant in its submissions discuss the imposition of a bar and the refusal to entertain a subsequent application as if they are synonymous as was done in, for example, *Innovative Earthworks Ltd.*, 2008 CanLII 44372 (ON LRB), I am of the view that although the effect of a "bar" or a "refusal to entertain" will be the same on a subsequent application, the time as of which the decision is made is different (a bar may be imposed by the Board when it issues the decision dismissing the initial certification application and a refusal entertain an application can only be made at the time the subsequent application is filed) and therefore the circumstances relevant to the Board's exercise of discretion may also be

different. In *Innovative Earthworks Ltd.* the employer requested that the Board refuse to entertain the application. The Board characterized that request as one in which the Board was asked to "exercise its discretion to bar this certification application pursuant to sections 7(8), 7(9) and 128.1 of the Act."

26. The applicant in its submissions stated:

> Generally, at the stage of withdrawal, even when the Board has assumed, without deciding, that it has the power to impose conditions on a withdrawal, it has not imposed a bar. Instead the Board is apt to leave that issue to the panel determining the subsequent application within the factual context of the subsequent application.

The applicant relied on the following passage in *Meter-Mix Concrete Ltd.*, 2005 CanLII 41950 (ON LRB); [2005] OLRD No. 4521 (QL) in which the Board dealt with a request by one of the responding parties to impose a one year bar on the applicant that had purported to withdraw its certification application being dealt with under section 128.1 of the Act when it wrote at paragraphs 6 and 7:

> 6. Forest City assumes that the withdrawal of this application does require the Board's consent and if such consent is required, Forest City submits the Board should impose conditions on the withdrawal. Assuming without deciding that leave of the Board is required for the applicant to withdraw this application, I am not prepared to impose a bar as requested by Forest City. It seems to me the issue of whether the applicant may or may not proceed with another application in respect of Forest City need not be determined at this time. That issue may be decided by the Board, if necessary, should the applicant file such an application.
>
> 7. In other words, there may be consequences arising from the applicant's withdrawal of this application. The parties' and the employees' attention is drawn to the provisions of subsections 128.1 (21) to (23) of the Act, which may have relevance in any future application relating to the employees in this bargaining unit.

The Board in *Meter-Mix Concrete Ltd.* did not address whether the Board had the power to impose a bar on subsequent applications as a condition of granting leave to withdraw that application. Nevertheless, I am of the view that the applicant has correctly set out the Board's approach in relation to requests to impose a bar on subsequent applications in connection with a certification application that is being withdrawn.

27. Moreover, even when the Act provides for a mandatory bar on subsequent applications following the dismissal of a certification application after a representation vote—see sections 10(2) and 128.1(15) or after a union withdraws a certification application after a representation vote—see sections 7(10) and 128.1(23), the Board does not in its decision either dismissing or noting the withdrawal of the application actually impose the bar mandated by the Act. Rather the Board directs the parties' and the employees attention to section 128.1(23) or section 10(2) as the case may be. See for example, *Bermingham Construction Ltd.*, 2014 CanLII 53086 (ON LRB); [2014] OLRD No. 2425 (QL); *MX Constructors Inc.*, 2014 CanLII 27592 (ON LRB); [2014] OLRD No. 1299 (QL).

28. As the Board is dealing only with the withdrawal of this certification application, and as the responding party has not suggested that there are any conditions that ought to be imposed in connection with this application but rather seeks to have the Board impose conditions that relate to the subsequent certification applications the applicant has filed, it is neither necessary nor appropriate for the Board in this decision to deal with whether it will refuse to entertain either or both of those subsequent certification applications in Board File Nos. 2943-14-R and 3295-14-R. In my view, whether the applicant will be permitted to proceed with either or both those two applications is an issue that ought to be addressed when the Board entertains the parties' submissions at the Case Management Hearing scheduled to take place in those two matters.

29. In the result, this application being dealt with under section 128.1 of the Act is withdrawn at the request of the applicant and with leave of the Board.

30. In its decision dated February 14, 2015 in Board File No. 2943-14-R the Board adjourned the Case Management Hearing in that application so that it is dealt with at the same time at the Case Management Hearing scheduled in connection with the applications in this matter and in Board File Nos. 0318-10-U, 3599-10-U, 3657-10-R, 3779-10-R and 4020-10-R for March 10, 2015.

31. The effect, if any, of this decision and sections 111(3) and 128.1(21) of the Act on the applications in Board File Nos. 2943-14-R and 3295-14-R can be dealt with at the Case Management Hearing that is scheduled in those two matters.

32. As this application for certification is now withdrawn, it will not be the subject of the March 10th Case Management Hearing.

33. The Board directs the responding party to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 45 business days.

1752-14-G International Brotherhood of Electrical Workers, Local 586, Applicant v. **Black & McDonald Ltd.**, Responding Party

Construction Industry Grievance – The union complained that the employer had not provided adequate notice of lay-off to employees, and had not provided the laid-off employees with their pay and records of employment in accordance with the collective agreement – The Board was asked to interpret the terms "when possible" and "if possible" in the provisions relating to the notices and delivery of wages and employment documents – The Board held that the meaning to be applied to the word "possible" in the articles at issue is an elastic one and may, in the circumstances and context of the collective agreement, be given meaning in accordance with relevant business, economic and operational realities – The Board was satisfied that the employer's decision to lay off the employees was spontaneous, so prior notice could not have been given to the union's business manager; because of the timing of the lay-off, it was not possible for the employer to prepare and deliver the records of employment at the time of lay-off, so the employer was entitled to rely on the default procedures – The employer did breach the collective agreement, however, when it failed to pay wages to three of the five employees at the time of the lay-off – Grievance allowed in part: issue of damages remitted to the parties

BEFORE: *Edward T. McDermott*, Vice-Chair

APPEARANCES: *Ron Lebi* and *Angele Harvey* for the applicant; *Richard J. Charney*, *Rita Sawatsky*, and *James Lowrie* for the responding party

DECISION OF THE BOARD: January 28, 2015

1. This matter is a referral of a grievance to arbitration pursuant to section 133 of the *Labour Relations Act, 1995*, S.O. 1995 c.1 as amended ("the Act"). The arbitration hearing before the Board commenced on November 17, 2014 and concluded on December 23, 2014 at which time the decision was reserved by this Vice Chair of the Board serving as arbitrator in this matter.

2. For ease of reference the applicant/grievor will be referred to as "the Union" or "the IBEW" and the responding party will be referred to as "the employer", "the company" or "Black & McDonald" throughout the remainder of this decision.

3. There is no dispute between the parties that they are bound by the provisions of the provincial Line Work Agreement portion of the Principal Agreement made between the Electrical Contractors' Association of Ontario and the IBEW Construction Council of Ontario for the work described in the Collective Agreement which falls outside the

ICI sector of the construction industry. The Provincial Line Work Agreement was referred to during the course of the hearing as the "Yellow Pages" of the Principal Agreement as opposed to other sections of such agreement which apply to other work jurisdictions in the electrical industry as well as specific provisions which apply to various areas of the province.

4. It is the essence of this grievance that the employer acted in contravention of the various provisions of the Provincial Line Agreement when, on August 21, 2014 and again on August 27, 2014 it laid off a number of union members from a project it was engaged on in Smiths Falls, Ontario, by:

(i) failing to provide the Union's Business Manager with the notice required pursuant to Article 7.05 of the Line Work Agreement which provides as follows:

> 705 Layoff Notification
>
> When possible, the Contractor shall notify the Business Manager three (3) days prior to a layoff, but in no case later than twenty-four (24) hours after the layoff.

(ii) failing to provide the employees with their EI Record of Employment ("ROE") at the time of layoff contrary to Article 903 of the Agreement; and

(iii) failing to provide the laid off employees with their wages at the time of layoff also being contrary to Article 903 of the Agreement which provides as follows:

> 903 LAYOFF
>
> Employees being laid off shall receive a minimum of one (1) hours' notice with pay. The Employee shall be allowed to leave the job at the time of the notification.
>
> He/She shall receive his/her wages and E.I. Record of Employment at the time of layoff, if possible; failing that, they shall be mailed by XpressPost to his/her home address within twenty-four (24) hours.
>
> On room & board jobs, where there is no payroll office, his/her wages and E.I. Record of Employment shall be mailed by XpressPost to the

> Employee's home address within twenty-four (24) hours of layoff.

5. While the fundamental facts giving rise to this grievance were not seriously in dispute between the parties, the meaning and conclusions to be drawn from such facts as they relate to the various provisions of the Collective Agreement under review were viewed quite differently by each of the parties.

6. The Board accordingly heard evidence from Angele Harvey, the Office Manager of the Union and Chastity Chadwick, a Controller with another electrical contractor who described how she on behalf of her employer handled the distribution of the payments owing and ROE's to employees who were laid off by her organization.

7. The Board also heard evidence from Mr. James Lowrie, the Project Manager for the Smiths Falls project who gave evidence as to the circumstances giving rise to the layoffs and the actions that he and the employer took with respect to the matters at issue in this proceeding.

8. The evidence received and essential facts relevant to this dispute are summarized as follows:

Background Facts

The evidence of James Lowrie

9. The Board heard the evidence of James Lowrie, the Project Manager of a solar power project at Smiths Falls, Ontario. Mr. Lowrie explained that Black & McDonald was engaged doing warranty work (repairing supports which had heaved because of the severe winter) at a location in Smiths Falls which is about an hour's drive from Ottawa. While Black & McDonald was to perform the electrical work on the solar panels, they needed a sub-contractor to first undertake the civil work in order to ensure that the solar panels were level. They were accordingly attempting to make a contract with a sub-contractor (M. Sullivan & Son Limited) but ran into some difficulty in negotiating the terms of the sub-contract arrangement as the sub-contractor did not want to be part of the prime contract with the owner which would expose them to additional liability.

10. While the parties were attempting to negotiate a resolution of their contractual difficulties, Black & McDonald had five electricians on site performing rack adjustments on the solar panels in preparation for when the civil work would be completed.

August 21, 2014 - Layoffs

11. Mr. Lowrie testified that on Thursday August 21, 2014 it became clear to him that the negotiations with the sub-contractor were not going well and were unlikely to

be completed shortly. The preparatory work that he had the employees working on had run out and accordingly there was no longer any work for them to perform. He accordingly made the decision at about noon hour on August 21, 2014 to lay off three of the five employees, Messrs. Vanderburg, Sproule and Flentje. These employees were accordingly advised at that time of their layoff and ultimately received an additional one hours' pay in lieu of notice of layoff as provided in Article 9.03 of the Line Work Agreement, supra. It is presumed the employees left the job site after receiving notification of the layoff as they are permitted to do under article 903.

12. Coincidentally, Mr. Lowrie decided at that time to retain the other two employees in case something happened to the negotiations with the sub-contractor to bring the dispute to a quick conclusion as this would allow him to get up and running on the project immediately rather than waiting to have a full crew called in. He accordingly kept Messrs. Friedy, a foreman ("competent person" under the OHSA) and Mr. Walter, an apprentice who was described as a good worker and available at a lower rate than the three journeymen that were laid off.

13. Mr. Lowrie testified that it was his responsibility to manage these projects (he had a total of five in all under his supervision at this time) and get them completed on time and in the most cost-effective manner. He accordingly, on his own initiative and without prior consultation with other supervision at Black & McDonald made the decision to layoff these three employees on August 21, 2014. The union did not challenge the business case for the decision or the *bona fides* of Mr. Lowrie in taking this action. The union is however very concerned about what they perceive to be the contraventions of the various provisions of the Line Work Agreement in the manner in which Mr. Lowrie and Black & McDonald went about effecting these layoffs and accordingly filed these grievances asserting the contraventions specified in paragraph 4, *supra.*

14. Mr. Lowrie explained that Black & McDonald's operations are somewhat compartmentalized and that the projects he was managing fell within the operational jurisdiction of the *Southern Ontario Utility Region* of Black & McDonald which is headquartered in Scarborough Ontario. Mr. Lowrie indicated that all of the administrative, payroll and managerial personnel of this division of the company were situated at Pullman Street in Scarborough and while Black & McDonald does have an office in Ottawa, that office deals with an entirely different work group with its own separate and segregated administration and managerial structure. In short, it has nothing to do with the project and warranty work which was being undertaken at the Smiths Falls project.

15. Accordingly, having made and executed the decision to layoff the three employees on August 21, 2014, Mr. Lowrie then provided notice of such layoffs to the union's business office (Ms. Angele Harvey) at 12:54 p.m. on that date. For the purposes of this case only, the Union accepts that such notice to Ms. Harvey was notice to Mr. James Barry, the Business Manager of the Union (as required by the collective

agreement). The exchange of emails between Mr. Lowrie and Ms. Harvey at that time indicates that she immediately inquired as to whether the employees had been given their ROE's and pay cheques to which Mr. Lowrie responded that the hours worked by the employees had been submitted to the employer's payroll department and they would receive their pay by direct deposit. Mr. Lowrie also advised that the ROE's would be processed electronically.

16. Ms. Harvey then advised Mr. Lowrie that the company was required to give the ROE and last two pay cheques to the men on the "day of layoff" or the company would incur penalties for non-compliance with the requirements of the collective agreement for each day the men were not paid.

17. This communication from Ms. Harvey then caused Mr. Lowrie to consult with his head office during the afternoon of August 21, 2014 (including a Human Resources advisor) relative to the proposed actions to be taken by the company in connection with the ROE's and payment of wages. By the time these discussions had been completed, the payroll department in Scarborough had left for the day and accordingly no action was taken that day to commence the direct deposit process for the payments owing to the employees.

18. On the next morning (Friday August 22, 2014) the Scarborough payroll department issued instructions to the bank at about 7:48 a.m. to commence the direct deposit process. That procedure however was not completed by the bank until the next business day (Monday August 25, 2014) when the payments owing were deposited to the credit of the bank accounts of the laid off employees. It seems to be accepted by both parties that direct deposit normally does not result in the funds being placed in the employee accounts until the next business day after the instructions are given to make the deposit which fact is somewhat recognized in article 902 of the collective agreement which deals with direct deposit in the context of payment of wages (see para 91 *infra*).

19. From the Supplementary Agreed Statement of Facts filed by the parties with the Board, it is agreed that all of the employees involved in this matter had voluntarily consented to be paid by direct deposit and had provided a cancelled cheque from their accounts in order to facilitate such a process.

20. Mr. Lowrie further indicated that insofar as the ROE's are concerned, they were sent by XpressPost to the employees at their home addresses on August 22, 2014 and were received by all of the employees on Monday August 25, 2014.

21. Mr. Lowrie also testified that the ROE's were sent electronically to Service Canada on August 22, 2014. When asked on cross-examination why the ROE's were not sent to the site trailer for delivery to the men or directly to the men by electronic means of communication, Mr. Lowrie indicated that it was his information that they were filed with the government electronically and could be accessed by the men online

from Service Canada. He also testified that neither the men nor anyone from the union had asked or directed him to have a copy of the ROE's sent to the union directly.

22. Mr. Lowrie also indicated he did not believe he could simply have the ROE's electronically transmitted to the site trailer so that a supervisor could copy them and provide them to the men directly since that would involve an invasion of privacy of the employees concerned inasmuch as the ROE contains confidential information (such as the social insurance number) of the employees in question. In his view such an action could only have been accomplished with the informed consent of the men.

August 27, 2014 - Layoffs

23. Over the course of the next several days no further progress was made in connection with resolving the contractual arrangements with the sub-contractor as a result of which Mr. Lowrie testified that on August 27, 2014 he was compelled to make the decision to layoff the other two employees, Messrs. Friedy and Walter. He testified that he once again made this decision spontaneously at about 10:00 a.m. on that date and the employees were advised accordingly and were at liberty to then leave the premises. Mr. Lowrie confirmed that he made this decision on his own and without consultation with anyone else at Black & McDonald.

24. Once again, immediately following his decision to proceed with the layoff, he notified Ms. Harvey that the two employees had been laid off. This notification was made within ten minutes of the notification to the employees of the layoff (*i.e.* 10:08 a.m. August 27, 2014).

25. Ms. Harvey for her part, once again questioned whether they had received their Records of Employment and final payments and was advised by Mr. Lowrie (at 12:36 p.m.) that they had been given an extra hour of pay (for lack of notice of layoff) and the direct deposit payment process would be initiated so that the payments would be in their bank accounts on the next day August 28, 2014. Mr. Lowrie advised Ms. Harvey (and Mr. James Barry, the union's Business Manager) that the final pay stubs and ROE's had already been dispatched by XpressPost that day to the employees in question and that such documents would arrive at their home addresses the next day (which did not turn out to be the case).

26. It is common ground between the parties that the payments owing were in fact deposited to the credit of the employees' accounts on Thursday, August 28, 2014 and that, while Mr. Walter's ROE was sent by XpressPost on August 27, 2014 and received by him on August 29, 2014, the ROE for Mr. Friedy apparently did not (contrary to Mr. Lowrie's belief) go out (by XpressPost) until September 2, 2014 and was successfully delivered to him on September 4, 2014.

27. In addition however Mr. Lowrie testified that the company took the additional step on Thursday, August 28, 2014 of sending a copy of the ROE by electronic mail to

the email addresses of Messrs. Friedy and Andrew. Memoranda from the payroll department to this effect confirms that such documents were sent at about 9:57 and 9:58 a.m. on that date to the two employees.

28. Accordingly, on the evidence of Mr. Lowrie (as supplemented by the Agreed Statement of Facts filed with the Board) the union was notified of the layoffs almost immediately after the decision to do so was made and executed on Wednesday, August 27, 2014. The procedures to complete the final payments to the men were set in motion on August 27, 2014 and the deposits received in their bank accounts on Thursday, August 28, 2014; the ROE's were uploaded to Service Canada on August 27, 2014 with a hard copy being mailed by XpressPost to Mr. Walter on August 27, 2014 (received August 29, 2014) and Mr. Friedy on September 2, 2014 (received September 4, 2014). In addition, the electronic copies of the ROE's were emailed to each of the employees on the morning of Thursday, August 28, 2014.

Evidence of Chastity Chadwick

29. The Board heard evidence from Ms. Chadwick, who was called by the union and is a Controller with another electrical contractor in the Ottawa area.

30. Ms. Chadwick gave evidence that when individuals in her company's workforce are to be laid off, she is responsible to generate the ROE's and the final pay for the employees, all of whom are on direct deposit.

31. From her Ottawa office, she receives the information from the supervisors with respect to the hours and is then able to enter it into the accounting system and generate an ROE which she can immediately upload to Service Canada. She can then prepare a copy of the ROE and assemble it for delivery to the men.

32. Coincidentally she also has the ability in her accounting system to switch the employees out of direct deposit and prepare a manual cheque for delivery to the men in the field. While she did not testify to this, it is assumed there is someone (perhaps Ms. Chadwick) in the office who can sign the cheque.

33. She will then assemble the copy of the ROE and the cheque and ascertain if the company's "driver" is available to get this to the men on time. If he is not she will look for other options to get them to the men including driving the documents to the site herself. She indicated that all of her company's jobs are in Ottawa and that she herself has driven out to deliver the copy of the ROE's and the cheques to the men, sometimes taking as much as three hours in a round trip.

34. While Ms. Chadwick's evidence relative to her practices at Federal and her predecessor job with another contractor (where she indicated she handled these matters in the same manner) are interesting and informative, they generally relate to situations where she has advance notice of the layoffs and do not deal with the particular situation

with which Mr. Lowrie was faced where the decision to layoff was made and executed spontaneously i.e. the men had left the workplace shortly thereafter in accordance with the provisions of the collective agreement and the cheques to be delivered to the employees could only have been prepared and executed from a location far distant from the work site (i.e. Scarborough to Smiths Falls).

35. In addition, Ms. Chadwick indicated that her present and predecessor employers had no projects outside the City of Ottawa and that she always worked with the Blue Pages under the Collective Agreement (i.e. the ICI sector, not the Line Work Agreement). As counsel for the employer pointed out, the wording of the comparable layoff provisions under the Agreement that Ms. Chadwick was working with is different from the language of the Agreement with respect to the issues in this proceeding. It does not, for example contain the qualifying words "if possible" and does contain other provisions which might be differently interpreted than the ones under consideration in this case.

36. By way of illustration, article 903 of the Blue Pages contains the following specific provisions as to how the wages and ROE's are to be delivered when there is "no established office" and when the employer is participating in a "direct deposit pay plan":

> 903 LAYOFF
>
> Employees being laid off shall receive a minimum of (1) hours' notice with pay. The Employee shall be allowed to leave the job at the time of notification.
>
> The Employee may be allotted additional time, not to exceed one (1) hour, to leave the job site at the discretion of the Employer. **He/She shall receive his/her wages and EI Record of Employment at the time of layoff.**
>
> On room & board jobs, **or** where there is no established office, his/her wages and EI Record of Employment shall be mailed by Canada Post Xpresspost, to the last address on record with the Contractor, on the day of layoff.
>
> On layoffs which occur outside of regular working hours, the Employee's wages and record of employment shall be mailed by Xpresspost to the

> last address on record with the Company, on the first regular day of work following the layoff.
>
> In the event that the Employee is participating in a direct deposit pay plan, the Employer shall authorize transfer of wages **on the first regular work day following layoff**. (emphasis added)

37. In essence, Ms. Chadwick indicates that it is her view that under the part of the Agreement she works with, there is no option but to deliver the ROE and the cheques to the employees who are being laid off on the day of layoff prior to them leaving the site and she accordingly undertakes these tasks to get the documents to the foreman on the site prior to the employee being advised of the layoff.

38. The situation which she described is not however present in this case and the applicable language of the collective agreement is quite different between the Blue and Yellow Pages.

39. Accordingly, while I was impressed by the extent to which Ms. Chadwick goes to comply with her understanding of the terms of the collective agreement with which her employer is involved, I do not find the evidence to be of significant assistance with respect to the issues before me in this proceeding.

Evidence of Angele Harvey

40. The union then called Angele Harvey, the Office Manager of Local 586 who, amongst other duties, is responsible for administering and dispatching workers from the union's "Out of Work List".

41. In essence, in order for a union member to obtain or be dispatched work through the union, the employee must sign the book that Ms. Harvey maintains for the Out of Work List. If a member is not on the Out of Work List they are or are presumed to be working and accordingly are not eligible for work assignments through the union.

42. If however they are laid off then they may, upon presentation of a copy of the ROE, sign the book and go on the Out of Work List. Their positioning on such list will depend upon the number of hours they have worked at the time that they sign the book to go on or back on the list. According to the rules established by the business manager of the union pursuant to the terms of the union's by-laws, once a member achieves 225 works they "bust out" and go to the bottom of the Intown list. If they have not achieved that level of working hours when they sign the book then they maintain the position they last held on the list before being assigned work. Different numbers apply for the Out of Town list but the principle is the same.

43. The point is that the union rules require a member to present a copy of the ROE in order that the union can verify the hours worked which thereby affects the members' position on the Out of Work Lists for future work assignments. According to the union therefore there is a potential consequence to the member of not being able to present a copy of the ROE to the union as soon as possible after the member is laid off because they can't go on the Out of Work List without one and might thereby lose job opportunities which come available until they are properly on the list.

44. It is the position of the union that these rules have been in place for a long period of time and are publicly posted in the union offices. It is how the union attempts to fairly administer the assignment and dispatch of work amongst their members.

45. It is also apparent on the evidence, that this is in part why the union places considerable importance on the provisions of the collective agreement at issue in this matter which require the employer to deliver the ROE's to the employees being laid off at the time of layoff unless it is not possible to do so. Ms. Harvey produced a series of ROE's which had been forwarded to the union on the day of layoff (sometimes directly from the employer via a direction issued by the employee to the employer) as an illustration of how the system is supposed to work.

46. Ms. Harvey also agreed that employees do not always receive their ROE's at the time of layoff and accordingly, in order to enable them to sign the book, she will advise the affected employees to call the employer and request that it email a copy of the ROE to her or to the employee. Once the document is in her hands she will then allow the employees to sign the Out of Work List book.

47. Ms. Harvey also testified that all ROE's are electronically filed with Service Canada and if their members have an account with Service Canada, they can log in or go to EI and have them look up their records and then print a copy of the ROE. Once the employee presents it to the union they will then be allowed to sign the Out of Work book.

48. Under cross-examination Ms. Harvey acknowledged that there is nothing which requires the employer to provide copies of the ROE to the union and in circumstances where an employer does so, it is because they have been specifically directed to do so by the employee. Finally, Ms. Harvey confirmed that where employers make payment to the employees by direct deposit, there will be a 24-hour delay before the money arrives in their account. She also indicated in her testimony (as she did in her email to Mr. Lowrie of August 21, 2104) that if the ROE and pay cheques were given to the men on the "day of layoff" the union would not have an issue.

The Position of the Parties

A. The Union

49. The union advances the position that the employer has undertaken the obligations set forth in Articles 705 and 903 "when" or "if" it is possible to comply with these obligations.

50. The union refers to a number of case authorities as illustrations of similar situations where arbitrators have interpreted qualifications such as "if practicable" or "if possible" and have determined that an evidentiary onus resides on the employer to satisfy the arbitrator that the exception applies. In the case of *Ivaco Rolling Mills v. United Steelworkers of America, Local 8794 (Laframboise Grievance) (*1997) 67 L.A.C. (4th) 66 Arbitrator Adell quoted an earlier decision of arbitrator Roach on this issue as follows:

> … Since the Employer has the responsibility for the management of its operations, it would appear to me that the evidentiary onus of showing whether or not it was practicable rests on the Employer.

51. It should be noted however that Arbitrator Adell went on to qualify the standard of justification which an employer must establish to discharge this evidentiary onus in the following terms:

> 28. It is important to emphasize, however, that the company should not be held to an unrealistically high standard of justification. In giving a functional meaning to a flexible term like "wherever practicable," an arbitrator should have an eye to economic and operational realities and should not impose on an employer a burden which is unreasonable in terms of cost, red tape, or reduced productivity. … For example, in the case decided by arbitrator Roach, the company had recently begun to use wooden cradles to protect coils during shipment, and those cradles had been made by bargaining unit employees, partly on overtime. Contracting out that work facilitated the steady supply of cradles needed to get shipments out, and it saved a substantial amount of money, as the contractor (a sheltered workshop) had labour costs which were a small fraction of the company's labour costs, especially its overtime costs. Arbitrator Roach, after quoting from my 1981 award on the meaning of "wherever practicable," held that under those circumstances the company had met the onus of showing that it was not practicable to continue to have the work done within the bargaining unit.

52. Similarly, in *Re Shaughnessy Hosp. Society and Hosp. Employees Union, Loc. 180*, 33 L.A.C. (3d) 385 the Arbitrator was called upon to determine whether the

employer had complied with the obligation in the collective agreement to "… eliminate, as far as possible, all part-time employees" in circumstances where as a result of a reorganization the employer had actually increased the number of part-time positions. In reviewing some of the applicable jurisprudence which touches upon this interpretative matter, the Board, commented as follows:

> 89. In reference to the jurisprudence, Mr. Archibald makes a number of points. He submits that all the cases cited by the union dealt with the legal convention concerning the time of delivery. The employer submitted a number of cases of its own. The employer cited a B.C. County Court decision, *In re Arbitration Act; In re Central Hotel and Homfray & Bral*, [1934] W.W.R. 360, and the cases therein, for the proposition that "as soon as possible" means not mathematically or scientifically possible but as "reasonably possible" or "practicable" or "reasonably possible in a business sense". The case of *Cooper v. Woolley* (1867), L.R. 2 Exch. 88, held that as far as possible meant "consistently with carrying on the trade in an ordinary manner and with a careful use of management …" (p. 92). Turning to more recent arbitral jurisprudence, although still somewhat dated, *Re U.A.W., Loc. 1075 and Canadian Car Co.* (1958), 8 L.A.C. 303 (Cooper), dealt with the assignment of overtime work on an equal basis "as far as is practical". Arbitrator Cooper Co. Ct. J., stated that: "Practical in a labour as well as a commercial agreement can be strictly but should be liberally interpreted. It must be construed to mean practical, business-wise, or economically practical, as well as mere[ly] physically practical" (p.315). Finally, the employer cites *Shaughnessy Hosp. and H.E.U., Loc. 180,* August 9, 1982, in which arbitrator Ladner dealt (p. 7) with the meaning of the word "practicable":
>
> > We disagree with the submission on behalf of the union that "practicable" simply means "possible" to the exclusion of any consideration of cost. In our view a determination of whether anything is practicable brings to bear a concept of reasonableness and cannot be done without a consideration of all of the circumstances including cost, and the reasonableness of the cost must be considered in the context …
>
> 90. In conclusion, the union's view is essentially that as far as possible means as far as conceivable or attainable. In other words, there are no restrictions on the employer's duty to eliminate part-time positions other than impossibility. The

> employer argues, first, that "as far as possible" is a meaningless expression that implies no obligation at all. In the alternative, "as far as possible" must be taken as a limitation to the effect that management must eliminate part-time positions only to the extent it is feasible or practical to do so.
>
> 91. This board prefers the employer's alternative interpretation. In our view, art. 22.05 cannot be read in the broad, mandatory manner suggested by Mr. Norman. The language does not easily bear the interpretation when read in the context of the entire articles. Additionally, there was no negotiating history submitted to this board to justify this broader interpretation and, even to the extent that some past practice evidence was submitted relating to the existence of part-time positions, it did not purport to deal with the application of art. 22.05.
>
> 92. In conclusion, this board holds that art. 22.05 requires the employer to eliminate part-time positions as long as it is reasonable or feasible to do so without incurring other undue financial obligations or liabilities.

53. The union also relies upon the cases of *Re Canada Post Corp. and Canadian Union of Postal Workers* [1999] C.L.A.D. No. 254 (QL) and *Re Telus Communications Inc. v. Telecommunications Workers' Union* [2006] C.L.A.D. No. 424 (QL) where the arbitrators, in interpreting the words "whenever practicable" noted some of the earlier jurisprudence which drew a distinction between those words and the word "possible" with the words "practicable and practical" requiring less stringent tests or criteria than the word "possible" in order to negate the earlier expressed undertaking or obligation.

54. The union accordingly submits that the use of the word "possible" in the articles under consideration poses a serious obligation on management to demonstrate why it cannot comply with the primary obligation under the article. The union concedes that the word and the articles do not impose an obligation on management to undertake unrealistic business decisions or actions in order to comply with the obligations but nor should they be entitled to disregard the terms of the agreement simply on the basis that it is inconvenient to follow them.

55. Viewed from this perspective, the union submits that the company could have given advance notice of layoff to the union under article 705 if Mr. Lowrie had paid greater attention to the obligation under the collective agreement to do so and planned the layoffs in a better fashion so as to enable him to comply with those obligations. As it was possible for him to do so, his failure to comply with that obligation constituted a contravention of article 705.

56. Similarly, in the submission of counsel for the union, it would have been a very simple matter for the employer to email copies of the ROE to the site trailer on the day of the layoff so that they would have been available to be given to the employees at the time of layoff. At the very least, they could have simply pressed an electronic button and had copies of the ROE's transmitted electronically to the laid off members on the day of layoff – just as they did on August 28th, 2014 to Messrs. Frieday and Walter.

57. Finally, the union submits that if the employees were under a direct deposit pay system which required twenty-four hours in order to get the money into their bank account, the employer should have recognized this and kept them on for an extra day in order that the funds were in their hands at the time of layoff. The union indicates that while such an action might have been inconvenient to the employer, it was possible for them to organize their affairs and reduce the workforce without contravening their obligations under article 903 of the Line Work Agreement.

B. The Employer's Position

58. The employer for its part asserts that in the circumstances of this case, it was not "possible" within the meaning of that word properly interpreted, to give the notice and deliver the ROEs and wages at the time of the layoffs. The employer asserts that the business realities with which the employer was confronted in these circumstances are fully contemplated and permitted by the provisions of the collective agreement.

59. The employer argues that the spontaneous nature of the decision to undertake the layoffs in this case coupled with the fact that the workforce was in a location far remote from the business and payroll office which had the responsibility for this work and the fact that all of the grievors had voluntarily enlisted in the direct deposit system of payroll, precluded it from complying with the primary obligations set forth in the collective agreement at the time of layoff. The employer asserts that under the collective agreement it was in these circumstances fully entitled to have resort to the exceptions as set forth in the articles at issue by delivering the notice to the union and the ROEs and wages to the employees in accordance with the default procedures and time limits set forth in the collective agreement as agreed to by the parties.

60. The employer accordingly takes the position that they have come forward with a full and complete explanation as to why they acted as they did and have accordingly discharged any evidentiary onus on them to show that it was simply not possible to complete the obligations set forth in the collective agreement at the time of layoff. Having done so, it is up to the union to discharge the legal onus on it to show how the collective agreement was violated, which, in the view of the employer, it has not done. The employer accordingly takes the position that it has fully discharged all of its obligations under the terms of the collective agreement. In light of the particular circumstances of this case, it was simply not possible to give advance notice to the union or to deliver the ROE and wages to the employees at the time of the layoff.

61. In support of its position the employer referred to a number of case authorities where arbitrators under various collective agreements have injected an element of business or economic practicality when interpreting provisions of a collective agreement which require certain steps to be taken "if possible" or "if practical or practicable".

62. In the case of *Re Western Grocers* [2000] M.G.A.D. No. 26 (QL), Arbitrator Hamilton dealt with a provision in the collective agreement which required full-time employees hired prior to a certain date to be scheduled Monday to Friday in their classification "where possible". After reviewing a number of previous decisions which had found that the word "possible" was deemed to be synonymous with the word "practicable", in the context of overtime distribution clauses, he made the following determination relative to the scheduling undertaking which was before him in this case:

> 111. Second, I agree with Mr. McKenna that Article 6(a) grants a special right to senior full-time employees who have worked for the Company, since on or before to January 1, 1986. These employees, by reason of their seniority, "...shall be scheduled Monday to Friday in their classification" (my emphasis). The purpose of this provision is to grant senior full-time employees weekends off and Mr. McKenna is correct when he said it is a quality of life or "lifestyle" issue.
>
> 112. However, this right or benefit is not an absolute one. It is to be granted (by the Company) "...where possible". This caveat is cast in objective language. By this I mean it is not expressed in terms such as "...where possible, in the opinion or judgment of the Company", similar to the subjective reservation to management made in Article 2(e) where the Company is given the right to form an "opinion" as to whether a promoted employee is unsuited to a new job following a 30 working day trial period. The Shorter Oxford English Dictionary (3rd ed.) defines the word possible as:
>
> > "1. That may be (i.e. is capable of being); that may or can exist, be done or happen...".
>
> But, what is or is not "possible" falls to be determined within the context of *bona fide* and reasonable business realities. From this perspective, the meaning to be given to the phrase "where possible" in a given situation is to be determined by what is "reasonably practicable", meaning that reasonable business considerations can be taken into account. In this regard, the benchmark for determining what is "possible" has really been

> identified by the parties themselves in the last sentence of Article 6(a) where they have agreed that if there are "…an insufficient number of shifts between Monday and Friday within their classification", then the pre-January 1, 1986 full-time employees will be required to work weekends (my italics). So, the primary benchmark is the availability of work and the realities of the business do provide the parameters for determining the limits of what is "possible" in this context. Simply put, the Company is entitled to schedule its employees (both full and part-time) to meet its legitimate business needs as they may arise from time to time and the last sentence of Article 6(a) clearly contemplates that there may not be enough work to meet the specific covenant in the immediately preceding sentence.

(See also *Re Long Manufacturing Co. and IAM, Local 2330*, (1997) 49 C.L.A.S. 297 (Levinson).

63. In *Re Fiberglass Canada Inc. and ACTWU Local 1305*, [1989] 15 C.L.A.S. 76 (Haefling) the Arbitrator was called upon to interpret the words "when possible" in the context of the requirement on the company to offer vacation relief assignments in a certain order. In finding that there had been no violation of the collective agreement when the company by-passed the grievor for such assignments, the arbitrator commented on the meaning to be given to the words "when possible" as follows:

> 12. … To my mind, the words "when possible" must also be given the meaning which makes labour relations sense in the context of a collective agreement covering the employer and employees in a continuous production process. The Union on interpretation of the words "when possible" in article 4:02(c) in effect means that, if there are any conceivable measures to be taken, those must be taken to enable the senior employee to become the designated vacation relief person. With respect, however, that interpretation would stretch the usual or ordinary meanings of "possible", those being the definitions to which counsel for the Company referred in argument. In addition to the references earlier cited, Roget's Thesaurus, for example, lists the following as synonyms for the word "possible": "feasible, practicable, viable, workable". In this case, therefore, in the absence of any different or more compelling language in article 4:02(c), I am unable to agree with the Union's interpretation of that provision and instead must accept as the correct one the Company's interpretation that it was not required in the circumstances here to appoint Mr. Rabishaw as the vacation relief Binder Mixer when to do so would have been

> impractical or would necessitate taking additional costly and extraordinary steps. ...

(See also *Re Shell Canada Products Co. and CEP, Local 848*, [1997] 47 C.L.A.S. 271 (Snow)).

64. As can be seen from the foregoing statement of the position of the parties and the various case authorities cited by each, they each have a somewhat different perspective on the meaning and application of the word "possible" as it is utilized in the context of articles 705 and 903 of the Line Work Agreement.

65. I do not, however, believe the parties are all that far apart in the context of the considerations to be taken into account in applying an interpretation to this word in the contextual circumstances in which it is used. In essence, it is my view that the meaning to be applied to the word "possible" in the articles at issue in this case, is a somewhat elastic one and may, depending upon the particular circumstances and context in which it is used in the collective agreement, be given meaning in accordance with relevant business, economic and operational realities. While I agree that the employer has an evidentiary onus to lead evidence to show why it was not possible to comply with the obligations set forth in the collective agreement in order that it can move to the default position, an assessment of those reasons should be conducted in light of the existing business and operational realities in the context of the language of the collective agreement as a whole and the factual context within which the decision and determination is to be made in order to determine if it is indeed "possible" to comply with the primary obligations under the collective agreement.

66. It is against this backdrop that I have considered and made decisions with respect to each of the elements of the grievance submitted by the union to this board for determination.

Decision

1. Notice to Union Under Article 705

67. As indicated earlier in this award, article 705 of the Line Work Agreement provides as follows:

> 705 Layoff Notification
>
> When possible, the Contractor shall notify the Business Manager three (3) days prior to a layoff, but in no case later than twenty-four (24) hours after the layoff.

68. On the evidence placed before this Board, Mr. Lowrie spontaneously and without any independent triggering event made a decision at about noon hour on August 21, 2014 to layoff three employees at which time they were advised accordingly. The union does not challenge the *bona fides* of this decision or that it occurred in the manner in which Mr. Lowrie testified. I accordingly accept his evidence that the decision was made without any element of pre-planning (or consultation with other members of management with Black & McDonald) and executed immediately.

69. The decision with respect to the layoff of the other two employees was made in a similar manner on August 27, 2014 at 10:00 a.m.

70. In these circumstances since there was no pre-planning of the decision, it was not possible in my view for the company to notify the union three days prior to the layoff since no decision to carry out the layoff was made until the time it was announced. I do not agree with the suggestion of the union that in these circumstances there was an obligation on the employer to defer executing its decision until after it had given the three days advance notice to the union. The provisions of the collective agreement, properly construed, do not require or contemplate such a result.

71. Notice to the union was communicated by Mr. Lowrie to Ms. Harvey within one hour of the decision of August 21 and ten minutes after the decision was made on August 27, 2014 which certainly is in compliance with the default provision set forth in article 705.

72. I accordingly find that there has been no contravention of article 705 in the collective agreement and the grievance insofar as it relates to that article is dismissed.

2. <u>Delivery of ROE at the Time of Layoff</u>

73. The union further asserts that the employer has contravened article 903 of the collective agreement by failing to provide the laid off employees with an EI Record of Employment at the time of layoff which, in the view of the union, it was possible to do. For ease of reference the provisions of article 903 are once again set out below:

> 903 LAYOFF
>
> Employees being laid off shall receive a minimum of one (1) hours' notice with pay. The Employee shall be allowed to leave the job at the time of the notification.
>
> He/She shall receive his/her wages and E.I. Record of Employment at the time of layoff, if possible; failing that, they shall be mailed by XpressPost to his/her home address within twenty-four (24) hours.

> On room & board jobs, where there is no payroll office, his/her wages and E.I. Record of Employment shall be mailed by XpressPost to the Employee's home address within twenty-four (24) hours of layoff.

74. The union asserts that it was indeed possible for the employer to provide the laid off employees with their ROEs at the time of their layoff because all they had to do was process it electronically to the trailer at the project location which, on the evidence, had a computer and printer available in order that the document could have been reproduced and given to the employees at the point they were advised of their layoff.

75. Once again however what this theory ignores is the fact that the decision to layoff was made spontaneously and executed immediately by advising the employees of the fact of their layoff. As indicated above, under the provisions of the collective agreement the employees are to receive one hours' notice of layoff with pay but it also goes on to provide that they can leave the job at the time they are given the notification and still receive the one hours' pay.

76. Putting aside the issue as to whether the provision of such a form to be printed at the trailer by a site supervisor might contravene the employee's right to maintain some of the information contained on such form in privacy, the fact is that in these particular circumstances at the time they were given notice they could simply leave. There was no evidence before this Board that any of the employees stayed at the job site after they were given the notice of layoff.

77. Accordingly, by the time the employer assembled and transmitted the information (with respect to the number of hours to be paid etc.) to its payroll people in Scarborough and it was electronically prepared and uploaded to Service Canada, and available for transmission to the employees, the employees would have departed the location before the information could be passed to the site trailer.

78. In the circumstances described before this Board therefore I do not believe it was possible to deliver the ROE to the employees at the time of layoff since, unlike the examples testified to by Ms. Chadwick, the layoffs were not pre-planned and accordingly the generation of the ROE could not have been prepared in advance.

79. It is also apparent to me that delivery of the ROE form to Service Canada does not constitute delivery of that document to the laid off employee. On the evidence before me, in order to access this information the employee must be registered and have an account with Service Canada in order to access the ROE form. There is no obligation under this collective agreement for an employee to take those steps. The obligation to deliver the form to the laid off employee at the time of layoff, if possible, is that of the employer.

80. Finally, as the union notes, the employer was able to deliver a copy of the ROE to the employees who were laid off on August 27 by emailing a copy to their email address (albeit not until August 28, 2014).

81. This does indicate that it is possible for the employer to get the ROE into the hands of the employee after it has been prepared and registered with EI.

82. Once again however, in my view, the provisions of article 903 require delivery of the wages and ROE at the time of layoff "if possible" and the preparation and filing of the form with EI would obviously take some period of time to accomplish. While Ms. Chadwick indicated that these steps can be taken quite quickly, she was dealing with situations where the layoffs were not being carried out until after the paper had been prepared and delivered to the job site. This was not the situation with respect to the instant case since, once again, the decision was made and executed spontaneously, and in circumstances where once the notice of layoffs was given, the affected employees could immediately leave the job site. It was accordingly not possible to deliver the documents to the employees "at the time of layoff". That being the case, the employer was entitled to rely upon the default provision in the collective agreement which requires the document to be mailed by XpressPost to the home address of the employee within 24 hours (of the time of layoff).

83. The fact that the employer in these circumstances had it within its ability to email a copy of the ROE to at least two of the employees (Messrs. Friedy and Walter) and in fact did so on August 28th, 2014 was, in the circumstances of this case gratuitous as there was no obligation under the collective agreement for the employer to do so.

84. Accordingly, since in my view, in these particular circumstances, it was not possible for the employer to deliver the ROE to the employees at the time of layoff, it was entitled to and did in fact follow the default procedures contained in article 903 by "mailing" the copy of the ROE to the employees by XpressPost at their home address within twenty-four hours. The time it arrives at the employee's home address is not regulated by the collective agreement.

85. The evidence indicates that this step was taken with respect to four of the five employees and accordingly I do not find any contravention of the agreement in this respect for those employees.

86. In the case of Mr. Friedy, however, the default provisions of Article 903 were not complied with as his ROE (for the layoff on August 27, 2014) was not mailed by XpressPost until September 2, 2014; arriving on September 4, 2014. This constituted a contravention of article 903 by the employer.

87. The evidence indicates, however, that the ROE was filed with EI and uploaded to Service Canada on August 28, 2014 and a copy was emailed to Mr. Friedy from head

office in Scarborough at 9:57 a.m. on August 28, 2014. There is no indication he did not receive this document by electronic transmission.

88. Accordingly, the evidence is that the ROE was actually sent to the employee after the layoff within the 24 hour default provision under article 903 albeit in a manner different from that contemplated by the language of the article.

89. While the employer committed a technical violation of the collective agreement, the effect of the steps it took was to accelerate the delivery of the ROE, which the employees actually received much earlier than if it had been mailed in accordance with the default provision of article 903.

90. I remain seized if there is any issue as to whether such a situation triggers the penalty provision of articles 905 which provides as follows:

> **905 PENALTIES**
>
> Failure of Contractor to comply with the requirements in Clauses 902, 903 and 904 will entitle the Employee to two (2) hours wages without work for each normal work day of non-compliance up to a maximum of thirty (30) hours. Effective January 1, 1989, when the Monday of a pay week is a statutory holiday, there shall be a twenty-four (24) hour grace period on the Penalty Clause as it applies to Clause 902.

3. Payment of Wages Under Article 903 to the Laid Off Employees

91. Article 902 of the collective agreement details the methods by which wages are to be paid to employees and provides as follows:

> **902 PAY WEEK**
>
> The pay week shall commence at 12:01 a.m. Sundays and end midnight Saturdays.
>
> Wages shall be paid weekly at or before quitting time by cheque Thursday or direct deposit to the Employee's bank account by Friday, and no more than one (1) week's wages may be withheld at any time. This direct deposit option is voluntary to the Employee. A pay stud showing all deductions will be issued weekly to the Employee at the jobsite. When a holiday falls on a pay day these days shall be moved ahead by one (1) day.

> Each Employee shall be given a detailed record of his earnings in accordance with federal and provincial regulations.

92. As can be seen from the foregoing, each employee is entitled under the collective agreement to voluntarily determine whether or not they wish to receive their wages by direct deposit. On the facts of this case, each of the employees voluntarily signified in writing to the employer that this is the method by which they wish to receive their pay. It is common ground between the parties that it takes a full business day for an employee to receive wages that are remitted to his bank by the direct deposit process. That however may result in the employee actually receiving his wages more quickly than by cheque since the employee is relieved of the time involved in taking the cheque to the bank or other pay cashing services and negotiating it. There is also no handling or holding of cheques on a direct deposit system so by using such a system, delays inherent in a cheque cashing system are avoided.

93. Accordingly, it is generally quicker and more convenient to receive payment by direct deposit rather than by a hand delivered cheque which is why many employees voluntarily opt for direct deposit.

94. On the facts of this case each of the employees had opted to be paid by direct deposit which, to their knowledge (as reflected in article 902 of the collective agreement), would necessitate a one day delay in the receipt of such wages. None of the employees had withdrawn or qualified their signed and written request to be paid by direct deposit prior to the layoffs at question in this case.

95. Article 903 however provides that employees are to receive their wages at the time of layoff, if possible. If that is not possible then they are to be mailed by XpressPost to the employees' home address within twenty-four hours.

96. In my view article 903 must be read in the context of article 902 pursuant to which the employees in question had voluntarily determined and signified to their employer that they wished to be paid by direct deposit.

97. Clearly it was not possible to physically deliver the wages of the laid off employees to a remote location in Smiths Falls which was far distant from the company's office in Scarborough that had responsibility for administering this work staff and the payroll and administrative processes applicable to them.

98. Where, as in these circumstances, the decision to layoff was made and executed spontaneously and immediately there was no possible way that a physical cheque could have been prepared and delivered to the employees at the time of layoff.

99. What was possible, however, was for the company to immediately initiate the payroll deposit process once the layoff had been announced bearing in mind that under

article 903 the employees were to receive a minimum of one hours' notice with pay. Accordingly, it would have been quite possible for the company to get the pertinent payroll information to their administrative office in Scarborough and have the direct deposit system initiated prior to the expiration of that one hour period. If they had done so the employees would have received their wages on the next business day in accordance with the direct deposit procedures. In other words, it is my view that the initiation of the direct deposit request could have been done within the requirement of a one hour notice period and that if it had been, it would have constituted, in the context of a direct deposit arrangement, receipt of wages by the employees even if they were not actually in their bank accounts until the next day.

100. After all, the delivery of a cheque is simply a direction by the employer to its bank to pay the employees monies out of its bank account. Instructions to initiate direct deposit involves much the same process as the delivery of a cheque i.e. an instruction by the employer to its bank (pursuant to a signed direction by the employees) to directly credit the employees' bank account with the amount stated, out of the account of the employer. Accordingly, the initiation of a direct deposit is as much the "receipt of wages" as is the delivery of a cheque.

101. There is no evidence before this Board that the employer took any steps to mail a cheque to the employees by XpressPost to their home address within twenty-fours of the time of layoff so that the default provision simply does not apply in this case.

102. The steps that the employer took to deliver the wages with respect to each of the respective layoffs as follows:

a) the direct deposit process for the three employees laid off on August 21, 2014 was not initiated until Friday, August 22, 2014 as a result of which they did not receive their wages until the next business day of Monday, August 25, 2014. That in my view constituted a contravention of the provisions of article 903 of the collective agreement relative to these three employees involving a delay of "payment" of one business day;

(b) With respect to the two employees laid off on August 27, 2014 the evidence indicated that the direct deposit process was initiated on August 27, 2014 and that both employees received their wages the next day, August 28, 2014. There is no indication as to the time at which the direct deposit process was initiated by the Scarborough office but the effect of this action was the same as it would have been had the instructions been given within one hour of the notification of layoff. In these circumstances I am of the view that the company complied with article 903 of the

collective agreement with respect to the delivery of wages to the two employees laid off on August 27, 2014.

CONCLUSION

103. In the result I have determined that the employer did not contravene article 705 of the collective agreement with respect to the requirement to give notice to the union of layoffs and nor did it contravene the provisions of article 903 of the collective agreement with respect to the requirement to deliver ROEs to the laid employees at the time of layoff except for the late mailing of the ROE by XpressPost to Mr. Friedy on September 2, 2014.

104. The employer did however act in contravention of article 903 with respect to the requirement to pay wages at the time of layoff to the three employees laid off on August 21, 2014 but not with respect to the two employees laid off on August 27, 2014.

105. The parties have advised that in the event I were to find contraventions of the collective agreement they would be able to resolve any issue of penalties or damages amongst themselves. I will accordingly leave such issue to the parties to determine but will remain seized in the event that there is any difficulty arriving at a resolution of such issue by agreement.

0682-14-R Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Applicant v **Detour Gold Corporation**, Responding Party

Certification – Construction Industry – The Board was asked to determine whether the work being performed by two individuals was "construction" or "maintenance" – The individuals were engaged in replacing a section of pipe (called the spool) in the processing of ore to extract gold – The actual work performed was identical to earlier replacements, with one exception: the rubber lined spool was being replaced by one with a ceramic lining – The evidence was clear that the spool itself is a wear part, which must be replaced on an ongoing basis in order to maintain the operation of the system; in the usual course, the replacement of the spool fits squarely within the definition of maintenance work – Was this an "alteration" within the meaning of the Act? – The applicant argued that money is one input into the system, and that by reducing this input the work made the system more efficient and therefore it "altered" the system – The Board disagreed: inputs into the system included things like raw ore, water, cyanide and electricity, but not money *per se* – The applicant could point to no authority to support the conclusion that the replacement of a wear part with a replacement that operates in precisely the same manner but simply lasts longer and ultimately costs less constitutes an alteration of the system – The work had to be done irrespective of the material used to line the spool and did not alter this primary

purpose – Individuals were performing maintenance work; there were no employees at work in the construction industry – Application dismissed

BEFORE: *Eli A. Gedalof*, Vice-Chair

APPEARANCES: *C. Flood, M. Bakhazi, R. Kramer, J. Bernier* and *G. Boyd* for the applicant; *George Waggott, Paul Boshyk, Chuck Hennessey* and *Rachel Pineault* for the responding party.

DECISION OF THE BOARD: January 12, 2015

1. This is an application for certification (construction industry) filed under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The sole outstanding issue in this matter is whether or not two individuals who were replacing a section of large pipe at the Detour Lake Gold Mine were at work in the "construction industry", within the meaning of section 1(1) of the *Act*. The applicant says that they were performing construction work, and that they were therefore at work in the bargaining unit on the application filing date and are eligible to participate in this application. The responding party says that they were engaged in maintenance work, that there were no employees at work in the bargaining unit on the application filing date, and that this application must therefore be dismissed.

Facts

2. Although the appropriate characterization of the evidence in this matter was highly contested, the evidence itself was not. The parties entered a number of documents into evidence on consent, and both relied on the applicant's statement of facts to the extent that it was not explicitly contested by the responding party's witness. The Board heard *viva voce* evidence from only one witness, Charles Hennessey, the General Manager of Operations for the responding party. While Mr. Hennessey was cross examined, he was not generally challenged on his account of the material facts in this matter, but rather on his characterization of those facts.

3. The Detour Gold Mine operates two lines which processes ore from the mine in order to, ultimately, extract gold. At the risk of oversimplifying the process, the lines consist of various crushers, mills, screens and tanks which are used to process the ore to a progressively finer aggregate and, during the later stages of the circuit, separate out the gold. The material is initially moved by conveyor from a primary crusher to secondary and pebble crushers, before being conveyed to the SAG Mill, which is the first of two mills used to break down the aggregate. Larger material exiting the SAG Mill is screened out and conveyed back to the pebble crusher to be crushed and milled

again, while the smaller aggregate moves on through the system by pipe, either by pump or by gravity, as a slurry of aggregate and water.

4. The particular section of pipe replaced by the employees in dispute on the application filing date was the "cyclone underflow line" on Line 2. The section of pipe is referred to as a "spool". The cyclones, or cyclone cluster, separate aggregate that has been processed by the SAG mill into fine particles, which are diverted to the leach tanks, and larger aggregate which is diverted to the ball mill, a fine grinding mill, for further processing. The spool in question carries slurry from the cyclones to the ball mill.

5. The slurry that moves through the circuit is highly abrasive. As a result, it is necessary to line the pipes with a protective material, in order to prevent the slurry from wearing through the walls of the pipes and causing blowouts. Other components in the circuit, such as the pans that house the filters and the ball mill are also lined in order to protect them from abrasion.

6. When the mine was constructed, the pipe used for the cyclone underflow line was a nine foot long, 30" (exterior diameter) rubber lined spool. Hennessey described the spool as a "wear item", which needed to be replaced periodically as the rubber lining was worn out. The work performed on the application filing date was the fourth time that the spool had been replaced over 14 months of operation. In each instance, the spool was replaced as part of a regular maintenance shut down. Initially, the line was shut down on a weekly basis for maintenance. The maintenance schedule was stretched to 2 weeks, and then three, but quickly returned to a 2 week cycle. Hennessey testified that it was not uncommon to need to patch a pipe in order to extend its use to the next scheduled shutdown, and indeed the pipe which was replaced by the employees in dispute had been patched a week earlier. However, he testified that it was never necessary to shut down just to replace a pipe, and that it could always be performed in conjunction with scheduled maintenance shut downs.

7. The actual work performed by the employees on the application filing date was identical to work performed on the prior spool replacements. The employees installed chain falls, clamps and shackles to secure the spool, removed the clamps holding the spool in place, and then using the chain falls, removed the spool and lay it down on its side. The new spool was installed with the same process in reverse. What sets the work performed on the application filing date apart from the three previous instances in which this spool had been replaced, was that with this replacement the responding party elected to replace the rubber lined spool with one that was lined with ceramic.

8. Hennessey explained that prior to this replacement, the 88 degree elbow below this spool was wearing out much more quickly than anticipated, and needed to be replaced every three to four weeks. The spool itself, although not wearing out as quickly as the elbow, was also wearing out far more often than the responding party had originally budgeted. The employer was approached by a vendor offering ceramic

lined pipes as an alternative to the rubber lined pipes. The vendor claimed that in a similar circuit used at a mine in Quebec, the elbows were lasting 8 months.

9. Given how quickly the rubber lined elbow was wearing out, Hennesey decided to test out the ceramic lined elbow. Although the part itself was more expensive than the rubber lined elbow, his hope was that increased durability would result in a cost saving over time. The rubber-lined elbow was being replaced every 3-4 weeks, costing $30,000.00 each time. The responding party monitored wear on the elbow and initial results were very promising (ultimately it proved to last 4 times longer). Consequently, Hennessey decided that he would also replace the rubber lined underflow spool with ceramic going forward, and ordered the parts for the next replacement. As with the elbow, the ceramic lined spools were more expensive than the rubber lined, but Hennesey hoped that the increased durability would result in a cost saving. Hennessey testified that he measures cost on a "per ton" basis, such that a part that processes more tons of ore for each dollar spent on the part is considered a cost saving.

10. In terms of the functionality of the ceramic lined pipe, aside from the increased durability it made no material difference to the operation of the line. The ceramic lining resulted in a 7% reduction in the interior diameter of the pipe. Hennessey testified that this could result in a theoretical reduction in the capacity, or flow, of aggregate through the system. However, Hennessey was clear that the capacity of the ceramic lined pipe was fully adequate to handle the flow that was actually travelling through the system, and that it did not in fact result in any "choking" of the system.

11. It was put to Hennessey in cross examination that replacement of the spools with ceramic lined pipe was part of a larger upgrade forming part of the "ramp up" program for the mine. Hennessey did not agree that the installation of the ceramic lined spool was part of any larger program, but did agree that other parts of the system, and in particular a number of pans that house screens were also replaced at various times with ceramic lined pans, also for the purpose of increasing their durability and ultimately saving money. In other instances, ceramic linings were replaced with rubber where the ceramic was cracking and proving less durable than rubber.

12. It was also put to Hennessey that the unanticipated wear of the rubber linings was a design problem that revealed itself and which had to be fixed. Hennessey did not agree that there were design flaws, but rather explained that it is common when a plant is built to use cheaper components in order to reduce start up costs, otherwise the plant would never get built. Once operating, there is an ongoing process of making the plant more durable and cost effective.

Argument

13. The applicant begins with the proposition, which was not controversial, that in assessing whether work is in the construction industry, the Board should look to the statutory definition and the nature and context of the work, and not to the specific

physical tasks performed by the employees. The identical physical tasks can be either maintenance work or construction work, depending on the context in which they are performed.

14. The applicant argues that in the particular context in which this work was performed, the replacement of the spool constituted an "alteration" of the piping system and therefore falls within the definition of the construction industry under the Act. In particular, the applicant argues that in changing the spool from a rubber lined to a ceramic lined part, the responding party upgraded the system and increased its overall functionality and efficiency. The system became more durable and efficient, in the sense that the part now lasts longer, and allows the responding party to produce gold at lower cost. Critical to the applicant's argument was the notion that increased efficiency is not measured only in terms of increased output, but also decreased input. Examining the system as a whole, one input into the system is money. By reducing costs through the use of the ceramic spool, the responding party increased the efficiency of the system. Cost efficiency was not incidental to the work, argues the applicant, but the purpose of the work. The applicant further argued that while Hennessey would not agree in his evidence that the spool replacement was part of a program of upgrades, it was one of several parts that were upgraded with ceramic components.

15. Much of the evidence and the parties' argument concerned whether the replacement of the spool was a "like for like" replacement. The applicant argued that this was a case where the responding party had a choice to either continue using rubber lined pipe, or change to the ceramic. The rubber lined pipe was not lasting as long as anticipated and was requiring more frequent replacement, leading to increased and unacceptable costs. The applicant argued that where a party choses an upgrade when the option of maintaining the existing system is available, in order to address a problem in the system, this is not a "like for like" replacement, and supports the conclusion that the work is in the construction industry.

16. The applicant relied on the Board's decisions in *Abitibi-Price Inc.,* [1986] OLRB Rep. December 1613 ("*Abitibi-Price*"), *Briecan Const. Limited,* [1989] OLRB Rep. May 417, 1989 CanLII 3476 (ON LRB) ("*Briecan Const.*"), *Delta Catalytic Industrial Services Ltd.,* [1997] OLRB Rep. November/December 979, 1997 CanLII 15544 (ON LRB) ("*Delta Catalytic*"), *Kennedy Electric Ltd.,* 1996 CarswellOnt 5894, [1996] O.L.R.D. No. 1389 ("*Kennedy Electric*"), *Johnson Controls Ltd.,* [2012] OLRB Rep. September/October 820, 2012 CanLII 53854 (ON LRB) ("*Johnson Controls*"), *Relamping Services Canada Ltd.*, 2005 CanLII 3067 (ON LRB) and *Matrix Service Inc.,* 2004 CanLII 22333 (ON LRB) ("*Matrix*") in support of its arguments. The applicant also relied on *Toronto Community Housing Corp. v. U.A., Local 46*, 2004 CarswellOnt 10075, [2004] O.L.A.A. No. 43 (an arbitration award) and *966566 Ontario Inc. operating as Luminex Lighting Solutions v. Zlahoda & Tartas*, ES-93-77, April 27, 1993 (Blair) (an unreported decision in an application for review of an employment standards officer's decision).

17. The responding party argued that this is a simple case of replacing a wear part in a system as part of its routine and regularly scheduled maintenance. This was the fourth time the spool had been replaced since the plant began operation, and the work performed in this instance was identical in all respects to each of the previous occasions. The only difference was the material that lines the interior of the pipe. While the responding party agrees that it hoped the part would be more durable and require less frequent replacement and save on maintenance costs, the use of ceramic did not add any new capacity to the system (and at least theoretically reduced its capacity). Money, agues the responding party, is not an input into the system, which is a system that extracts gold from ore, and saving money does not alter the system. The absence of any increase to production capacity is, the responding party argues, a hallmark of maintenance work. The responding party likened the work to replacing brake pads on a car: a person can chose to upgrade to ceramic brakes in order to increase wear life and ultimately save money on maintenance costs, but it does not alter the nature of the work which is routine maintenance replacing a wear part.

18. The responding party relied on the Board's decisions in *Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. October 1477 ("*Master Insulators*"), *National Elevator & Escalator Association*, [1991] OLRB Rep. April 555, *Levert & Associates Contracting Inc.*, [1989] OLRB Rep. June 630 and *Swift Railroad Contractors Corporation*, 2009 CanLII 3244 (ON LRB) in support of its argument.

Analysis

19. Section 1(1) of the Act defines the "construction industry" as follows:

> "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site;

20. There was no dispute that the circuit at the Detour mine was the kind of system on which either construction or maintenance work could be performed, and the parties agreed it was not necessary to determine whether it was a "structure" or "other work" within the meaning of the Act. The essential question was whether replacing the rubber lined pipe with a ceramic lined pipe constituted an "alteration" of the system within the meaning of the Act.

21. The distinction between construction and maintenance work can be exceedingly fine, and is often highly contextual, turning on the specific facts of a given case. A review of the authorities presented by the parties makes clear that there is no single articulation of the difference between construction and maintenance that will be definitive in all cases. Nonetheless, the Board's frequently cited decision in *Master Insulators'* provides a useful starting point for the analysis. In *Master Insulators'*, the Board found that work that "sustained and maintained an operating facility and enabled

that facility either to operate efficiently or to attain its designed or production capacity" was maintenance work, and "[m]aintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility" (para.28).

22. In *Delta Catalytic*, the Board cautioned against taking an overly simplistic view of this distinction, particularly where the work involves the installation of new and improved components. The Board rejected the argument that such changes will always constitute construction simply because they result in some form of enhancement. In *Delta Catalytic*, the Board was assessing several packages of electrical work, and summarized its analytical approach as follows (at paras. 23-24):

> 23. The applicant submits that in today's technological world, practically speaking, every time new electrical work is done on a facility, project, system, or machine, it is "construction" work and not "maintenance". Employers will virtually always choose to upgrade electrical systems when work is being done on them, and any work on them will involve new wiring, new conduits, new termination devices or new process control devices, to take some examples. Such work will always, asserts the applicant, enable the facility, project, system, or machine to add to or enhance its capabilities, if only because of the installation of the improved technology.
>
> 24. This is too simplistic and microscopic an analysis. The nature of electrical work will inevitably mean that new hardware is installed as part of the work, whether it be wiring or electrical or electronic devices, but this does not inevitably mean that the work is "construction". In some cases, work of this nature may not be meaningfully different in concept from the installation of new piping, new iron plating or new insulation. While the raw material involved may be new, that fact alone will not necessarily be determinative. The Board still must consider the nature and purpose of the work, in the context of the particular facility, project, system, or machine in question. The replacement of an outdated electrical measuring device with an updated electronic measuring device, which may well be more efficient and enhance the measuring capability, will not necessarily be "construction" work, where that is all that is being changed, and where the nature and purpose of the system has neither changed nor has its overall capability or productivity been enhanced. The result will depend on the extent of the change and its nature and purpose. Similarly, the installation of new gauge wiring for old gauge wiring will not necessarily be "construction" work. It is the context and purpose

> of the work which must always be considered and not only the detail of the work that the particular trade is asked to perform.

23. In applying this analysis, the Board noted that while the extent or significance of the addition to a facility or system is a factor to consider, it is not determinative. Work on a small and discrete part of a facility can nonetheless constitute work in the construction industry. However, it is also the case that in applying the term "alteration" in the Act, the Board is not engaged in a microscopic analysis, where anything that changes the system in any manner constitutes "construction" work.

24. In my view, there is no doubt that had the responding party replaced the rubber lined spool with another rubber lined spool, this would have constituted maintenance work. The evidence was clear that the spool itself is a wear part, which must be replaced on an ongoing basis in order to maintain the operation of the system, and in the usual course the replacement of the spool fits squarely within the definition of maintenance work, as articulated in *Master Insulators'*. Although the applicant was not prepared to concede this point, it did allow that had the responding party been replacing the spool with with another rubber lined spool it would have been facing a very different and more difficult case. Further, the applicant focussed its argument exclusively on aspects of the work related to the decision to switch to a ceramic lined spool, rather than continuing to use a rubber lined part.

25. Fundamental to the applicant's argument was the assertion that by improving durability of the part and thereby saving cost, the system became more efficient. The applicant suggested at one point that cost efficiency was the "purpose" of the work, but in my view this is an overstatement. Cost efficiency was the purpose of switching to a ceramic lining, but it cannot be described as the purpose of doing the work. The spool is, and remains, a wear part that must be periodically replaced or the system will fail. The spool being replaced was worn, had been repaired once already, and needed to be replaced in order to keep the system running. The primary purpose of the work was to keep the system running. The purpose of choosing ceramic over rubber was clearly to increase durability and reduce cost but, as the responding party argued, it is not accurate to describe that as the sole purpose of the work in replacing the spool.

26. The real issue is, in my view, whether the increased lifespan of the part coupled with the resultant cost saving is sufficient to transform what would otherwise be routine maintenance work into work in the construction industry. The applicant's argument is based in large part on the notion that money is one input into this system, and that by reducing this input the work made the system more efficient, and that this is therefore an "alteration" of the system.

27. I do not agree that money is an input into this system in the way that the applicant argues, such that a reduction in cost constitutes an "efficiency" for the purpose of determining whether the work "altered" the circuit. It is clear that cost saving *per se* cannot dictate whether work is construction or maintenance work. If it

did, then the distinction between construction and maintenance could turn on factors as arbitrary as the sale price of part. A 50% off sale on a wear part does not suddenly transform the replacement of that part into construction work. The applicant's argument was not so blunt as this, since it relied on the cost saving coupled with the increased durability of the part together. But in my view, the cost aspect of this analysis is simply not helpful. The system in issue in this case is a circuit that extracts gold from ore. Inputs into that system include things like the raw ore, water, cyanide, and electricity, but not money *per se*. Money may of course be used to pay for parts and work, but whether one pays more or less for those goods and services does not assist in determining whether the application of those goods and services constitutes an "alteration" to the system within the meaning of the Act. I do not accept, therefore, that saving money on maintenance costs is analogous to increasing the output of gold from the system, as the applicant argued.

28. The applicant relied heavily on the Board's decision in *Johnson Controls* in support of its argument that a reduction in inputs constitutes increased efficiency and therefore an "alteration" of a system. *Johnson Controls* concerned whether an upgrade to the lighting system at manufacturing facility was construction or maintenance. Specifically, *Johnson Controls* involved the replacement of a variety of older fluorescent and metal halide light fixtures, with 1861 newer more efficient fixtures. It did not require the movement of any new electrical boxes or the pulling of any new conduit (paras. 10-12).

29. The Board looked at the nature and purpose of the work and concluded that it was multifold. The work would save energy, energy costs and maintenance costs, since the new lamps would consume less energy and require less frequent replacement of the bulbs. Second, it would reduce inventory, since the conversion to a single ballast and lamp type would eliminate the need to have a variety of lamps and ballasts on hand. Third, the new system would comply with government regulations and industry standards, and address a ban on the manufacture of one of the lamps being used in the system. Finally, the new system would qualify the owner for rebates and incentives for energy savings.

30. The Board summarized the distinction between construction and maintenance in the context of an existing system as follows (at para 44):

> The Board's case law draws a distinction between: (1) work that is performed on an existing system for the purpose of preserving the operation of the system; and (2) work that is performed for the purpose of enlarging, improving, reconfiguring or expanding the capacity of the system. Work that is undertaken to maintain or sustain a system is not considered to be construction work even where such work include replacing components of the system with updated components. In contrast, work that enlarges, improves, reconfigures or expands the capacity of the system is

> views as an "alteration" to the system. Maintenance work preserves the existing state of the system. Construction work alters or changes the system. As such, I concur with Arbitrator Petryshen [in *Toronto Community Housing Corp. v. U.A., Local 46,* 2004 CarswellOnt 10075, [2004] O.L.L.A. No. 43, 75 C.L.A.S. 458] that "whether the work on the system has left one with essentially the same system or whether the result is a different system" is one of the factors to be considered when determining whether work is within the construction or not.

31. Applying this analysis to the specific work at issue in Johnson Controls, the Board concluded (at para. 46):

> On the facts before me, the energy efficiency work involved the wholesale replacement of a vast number of components and fixtures. The result of the energy efficiency work is that the lighting system can now create the same amount of illumination with half the energy. The system can now operate twice as long for the same amount of electricity. In my view, the result of this alteration (requiring half the input to produce the same output) is no different from an alteration to an operating system that increases the system's operating capacity that the Board has long held to amount to work in the construction industry. If altering a system to double its output is construction work, I see no basis upon which to find that altering a system to require half the input to produce the same amount of output is not also construction work. The work, in both cases, "altered" or changed the system. Accordingly, I find that the energy efficiency work had the effect of altering the lighting system and is work in the construction industry.
>
> [emphasis added]

32. I accept the Board's reasoning in *Johnson Controls*, and specifically agree that a reduction in inputs can result in increased efficiency in the same way as an increase in output can increase efficiency. However, in *Johnson Controls*, the input in issue was electricity, i.e., the very thing that is fed into the system to produce light, which is its output. The Board's analysis in *Johnson Controls* did not turn on the cost saving, but the changes made to the system that altered the manner in which it operated, and the way in which it produced its output. In the instant case, the change in lining material of the spool had no effect on the way the system operates or how it produces its output. Subject to a theoretical reduction in flow which the evidence establishes had no tangible effect on the operation of the system, slurry flows through the pipe in exactly the same manner irrespective of the material used to line the pipe.

33. None of the authorities relied on by the applicant support the conclusion that the replacement of a wear part with a replacement part that operates in precisely the same manner but which simply lasts longer and therefore ultimately costs less constitutes an "alteration" of the system.

34. The work performed in *Relamping Services Canada Inc.,* 2005 CanLII 3067 (ON LRB), a case which arose under the *Occupational Health and Safety Act,* and *966566 Ontario Inc. operating as Luminex Lighting Solutions v. Zlahoda & Tartas,* ES-93-77, April 27 1993 (Blair), a decision in an application for review of an order to pay under the former *Employment Standards Act,* was similar to that performed in *Johnson Controls*.

35. In *Abitibi-Price*, the Board concluded that changes to the white water system in a paper mill were intended to increase the availability of white water which would improve the quality of the newsprint produced, and reduce the risk of lost production resulting from paper breaks. The work was not, therefore, as the applicant suggested, performed solely to reduce costs and the frequency of maintenance. Unlike the instant case, the alterations made in *Abitibi-Price* had an effect on production.

36. In *Briecan Const.,* the Board found that the installation of new cooling components in a smelter was construction work, concluding that "the additions and modifications that were made during the shutdown clearly were done to improve the cooling system, conserve valuable water resources and facilitate easier maintenance on the new meters without having to shut off the gas" (at para. 32). Again, this case involved an alteration in the manner in which the system operated, and savings on actual inputs into the system (in this case water).

37. *Kennedy Electric* involved a variety of electrical work related to a beer bottling operation, including work on the bottle cleaners and fillers. One aspect of the work included the replacement of some electrical components, such as conduits and contacts, with rubberized or stainless steel components that were more resistant to corrosion and therefore reduced downtime due to mechanical and electrical malfunctions. The applicant likened these changes to the replacement of rubber lining with ceramic lining on the spool, where the ceramic is more resistant to abrasion from the slurry. However, a review of the full package of work in issue in *Kennedy Electric* reveals that the work included upgrades to the functioning of the system, adding new communications functionality, relocating a rerouting various components in the system, and upgrading components that do not appear to be wear parts requiring routine replacement, but rather parts that were failing because of design issues. The nature of the changes to the system in *Kennedy Electric* go far beyond the installation of a more durable wear part, which otherwise operates in the same manner as the previous part.

38. *Matrix* involved the lifting up an oil tank and building an entirely new foundation and angular ring for the walls of the tank. As the Board concluded (at para 35):

> However, the bulk of the work on this tank was the lifting up of the tank and the building of a new foundation and angular ring as the foundation for the walls. This work went far beyond routine maintenance. The need for the work were not obvious from the in-service inspection. It was only when the out-of-service inspection was performed that Enbridge realized that the original design and structure of the tank was not suitable for the base on which it was constructed. The tank had not "failed" in the sense that it had broken apart or was so distorted that it could not be used to store crude oil or was leaking. However, it was evident that the tank would reach that stage far more quickly than anticipated if something was not done.
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> 36. That "something" was far more extensive than the timely maintenance that forestalls the need for more extensive repair later on. Repair, in the sense of returning the tank to the state in which it was originally constructed, would not address the basic problem: simply put the design of the tank was not appropriate for the soil and granular base. What Enbridge decided to do was to adopt and construct an entirely different design. This involved major structural changes, including the building of extensive concrete foundations and a new angular ring on which to rest the tank shell. This is not maintenance. It is re-design and re-building of the tank. That is construction work.

39. The applicant argues that the replacement of the rubber lined spool with the ceramic lined spool is analogous, since neither repair of the rubber lined spool nor replacement of the rubber lined spool with another identical spool would address the problem that the spools were wearing out prematurely and causing excessively high maintenance costs. Further, the applicant urges the Board to examine the replacement of this spool in the context of the responding party's overall efforts to increase the durability of the system by replacing a number of rubber components with ceramic. Again, it is my view that the applicant overstates the impact of the switch to ceramic lined wear parts. The replacement of the spool with one that will last longer does not make it more than timely maintenance that forestalls a failure of the system down the road. Neither does it constitute a "re-design and re-building" of the circuit at the Detour Mine. Taken at its highest, one could describe the change as a replacement of "like for like but better". Even if the replacement of this part is considered in the context of a larger program of replacing other wear parts with more durable substitutes, this does not in my view change the fundamental nature of that work.

40. Neither, in my view, is the existence of a choice between a more or less durable part determinative of the issue, although to the extent that the choice between two parts results in an enhancement of the system it may be relevant evidence. As the Board held in *Delta Catalytic*, "the result will depend on the extent of the change and

its nature and purpose" (at para. 24). The question is whether the upgrade from a rubber lined to a ceramic lined spool constitutes the kind of change to the system contemplated by the term "alteration" in the Act. In terms of the operation of the system and the manner in which it extracts gold from ore, the change to ceramic had no effect on the system at all. The only change is that a wear part that used to require more frequent replacement now lasts longer. However, the evidence was that the effect of this increased durability was limited to the spool itself, and had no other effect on the operation of the system. It would not reduce the frequency of maintenance shutdowns or otherwise have any systemic effects on the circuit. In my view, the work is not analogous to the kind of systemic work performed in *Johnson Controls*. It is more like the replacement of a single incandescent bulb with a fluorescent bulb, which has a greater initial cost, but which is expected to last longer and ultimately costs less to produce the same light and serve the same function. Further, as noted above, the primary purpose of the work was to replace a wear part in order to preserve the functioning of the system. This work had to be done irrespective of the material used to line the spool, and substitution of a more durable material inside the spool did not alter this primary purpose. In my view, this is not the kind of upgrade that constitutes an "alteration" of the circuit at the Detour Mine, within the meaning of the Act.

41. For these reasons, I find that the work performed by the two individuals in dispute was not work in the construction industry. There were therefore no employees at work in the bargaining unit on the application filing date. Accordingly, this application is dismissed.

1671-14-R; 2063-14-U Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **EBC Inc.**, Responding Party

Certification – Construction Industry – Practice and Procedure – LIUNA filed a certification application, electing to proceed under section 128.1, and a section 96 complaint a month later – In both the certification and ULP, the union asked for remedial certification, if necessary, under section 11 – In its certification application, LIUNA claimed there were four employees in the unit and that more than 55% of those employees were its members – When the employer filed a response claiming there were 10 employees in the unit, LIUNA challenged all 10 and sought to add three to the list – At the Case Management Hearing the parties agreed that the two files should be heard together, and whether the union could seek relief under section 11 in the proceedings would be dealt with by the panel hearing the merits (the response to the ULP was not due by the time of the CMH) – LIUNA moved to convert the s. 128.1 application so that it could be dealt with under section 8 and said that it did not want a vote, but was seeking the amendment to obtain remedial certification – The Board refused to allow the conversion, holding that the rationale for the request was LIUNA's concern that if a sufficient number of the employees on the employer's list were part of the bargaining unit, its support would fall below 40% – Such a conversion cannot be used for tactical reasons once a union has filed what was in its view a

certification application with adequate support – Whether s. 11 remedial certification can be sought in the context of a s. 128.1 application remained an open issue – Matter continues

BEFORE: *Harry Freedman*, Vice-Chair

DECISION OF THE BOARD: January 6, 2015

1. This decision deals with the preliminary and procedural motions made by the parties following the Board's decision dated October 24, 2014 after a Case Management Hearing in this construction industry certification application being dealt with under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") in Board File No. 1671-14-R and unfair labour practice complaint filed under section 96 of the Act seeking declaratory and other relief in Board File No. 2063-14-U. The Board in that October 24th decision noted at paragraph 13 that the parties had agreed the certification application and the unfair labour practice complaint be heard together.

MOTION TO AMEND APPLICATION TO BE DEALT WITH UNDER SECTION 8 OF THE ACT

2. In its certification application filed on September 10, 2014, despite claiming that there were four employees in the bargaining unit[1] and asserting that it had filed membership evidence on behalf of more than 55% of the employees in the bargaining unit, the applicant alleged that the conduct of the responding party had the effect of ending the applicant's organizing campaign and that it would file an unfair labour practice complaint and seek certification under section 11 of the Act.

3. The applicant filed its section 96 application in Board File No. 2063-14-U on October 14, 2014 and specifically sought an order certifying the applicant under section 11 of the Act relying, in part, on the responding party firing WP, an individual who the applicant alleges had signed a membership card on September 10, 2014.

4. The Board's October 24th decision noted that one of the four preliminary or procedural issues raised by the parties was whether the applicant can proceed with its request for section 11 relief in relation to the certification application which it had elected be dealt with under section 128.1 of the Act. The Board at paragraph 14 of that October 24th decision wrote:

[1] In its September 18, 2014 decision, the Board (differently constituted) found that construction labourers employed by the responding party in the industrial, commercial and institutional sector in the province and in all other sectors in Board Area 21 was the appropriate bargaining unit.

> The parties further agreed that whether the applicant can continue to seek remedial certification under section 11 of the Act in these proceedings is an issue that may be determined, if necessary, by the panel of the Board that is assigned to hear and determine the application for certification and unfair labour practice complaint in Board File Nos. 1671-14-R and 2063-14-U.

5. Despite the parties' agreement to have the panel that is assigned to hear and determine both the certification and section 96 applications deal with whether section 11 relief was available to the applicant in these proceedings, the applicant moved by letter dated November 20, 2014 to amend its certification application so that it can be dealt with under section 8 of the Act. The Board in its November 21, 2014 decision in Board File No. 1671-14-R treated the applicant's November 20th letter as a preliminary or procedural motion.

6. The applicant filed further submissions on December 15, 2014 in support of its request to amend its certification application.

7. The responding party in its submissions filed on December 29, 2014 opposes the applicant's request to amend the certification application so that it is dealt with under section 8 of the Act.

8. The responding party acknowledges that the Board has the discretion to amend the certification application as requested by the applicant but submits that it ought not to do so in this case.

9. The applicant contends and the responding party agrees that the Board must consider two factors when determining whether to permit an applicant to amend its certification application so that it is dealt with under section 8 of the Act after having initially elected to have it dealt with under section 128.1 of the Act:

a) the reason the applicant seeks the amendment; and

b) whether granting the amendment prejudices the responding party.

See *L & L Painting and Decorating Ltd.*, [2006] OLRB Rep. May/June 385.

10. The applicant contends it has good reasons for seeking to have its application dealt with under section 8 of the Act rather than under section 128.1. It points out that it does not wish to have a representation vote take place because it believes that due to the responding party's conduct, the true wishes of the employees will not be disclosed by any such vote. The applicant asserts that it need only show it "has an easily identified interest in converting its application" to meet the first branch of the test and relies on *L & L Painting and Decorating Ltd.* The applicant also maintains that the

responding party cannot be prejudiced by having the Board amend the application at this stage of the proceedings since the responding party was put on notice when the certification application was filed that the applicant intended to seek relief under section 11 of the Act, if necessary, even though it had elected to have that application dealt with initially under section 128.1 of the Act.

11. In essence, the applicant's reason for moving to have its application for certification amended and now dealt with under section 8 of the Act is so that it can, if necessary, obtain remedial certification under section 11.

12. The Board in *L & L Painting and Decorating Ltd.* did not determine whether to amend the application for certification. It dealt only with whether the applicant in that case could seek to have the application amended from being one dealt with under section 128.1 to one being dealt with under section 8. That was made clear when the Board wrote at page 389:

> This decision deals with whether an amendment is possible under the Act, and does not deal with the prejudice issue now or at some theoretical point in the future in this case at all.

13. The applicant asserts that it seeks certification under section 11 because its "organizing campaign was effectively terminated by the actions of the Employer" and "so that it may have access to s. 11 relief should its support in the bargaining unit fall below 40%."

14. The Board has permitted an applicant that had elected to have its application initially dealt with under section 128.1 of the Act amended so that it would proceed under section 8 in order to seek remedial certification under section 11 when it had been unable to secure membership support from at least 40% of the employees in the bargaining unit at the time it filed its application in *Southside Construction (London) Ltd.*, [2005] OLRB Rep. Sept./Oct. 854; *Monarch Development Corp. (c.o.b. Monarch Homes)*, 2005 CanLII 41982 (ON LRB), [2005] OLRD No. 4598; and in *Marshall Homes*, 2006 CanLII 13298, [2006] OLRD No. 1456.

15. In *Carlos Barbosa Concrete Limited*, (2007) 134 CLRBR (2d) 8, 2007 CanLII 13279 (ON LRB) the Board permitted the applicant to amend its application that was being dealt with under section 128.1 after the Board had determined that two of the individuals the applicant had challenged were not managerial with the result that fewer than 40% of the employees in the bargaining unit were members of the applicant union in that case. The Board in that case noted that shortly after the decision in *Southside Construction (London) Ltd.* was issued the applicant had requested leave to amend its application to pursue relief under section 11, if necessary and that "the steps taken in the certification application to date involving the resolution of the outstanding disputes are ones that would have had to be taken regardless of whether the application had originally been filed under section 8 or 128.1 of the Act."

16. The responding party asserts that not only has the applicant failed to provide a good reason for seeking to amend the application, it will be prejudiced by the Board granting the amendment.

17. The applicant in its certification application claimed there were four employees in the bargaining unit and that it had filed membership evidence on behalf of more than 55% of those employees. Although the applicant claims that the responding party's conduct effectively ended its organizing campaign, it chose to file its certification application when it believed that more than 55% of the employees in the bargaining unit were its members. By filing its application when it did, it proceeded on the basis that it had sufficient membership among the employees in the bargaining unit to obtain certification under section 128.1 without having a representation vote take place. When it decided to file its certification application, the applicant chose not to continue its organizing campaign among the bargaining unit employees to attempt to secure more membership support. It is clear therefore that the applicant did not believe it had made a mistake when it elected to proceed under section 128.1 of the Act.

18. Moreover, unlike the situation in *Carlos Barbosa Concrete Limited*, the applicant knew or ought to have known that it may not obtain relief under section 11 of the Act when it elected to have its application dealt with under section 128.1. The Board in *Carlos Barbosa Concrete Limited* noted, after referring to the decision in *Marshall Homes* in which the Board permitted the amendment because there was still some question at the time that application had been filed whether relief under section 11 was available when the certification application was being dealt with under section 128.1:

> Similarly, in the present case, the application for certification and request for relief under section 11 of the Act were filed prior to the issuance of the Board's decision in *Southside Construction (London) Ltd.,* cited above, and the decisions that have followed it. It therefore cannot be said that the union knew that its claim for relief under section 11 would not be permitted if it elected to proceed under section 128.1 of the Act.

The Board was therefore satisfied that the applicant in that case had good reason for seeking to amend its application.

19. In this proceeding the applicant points out that it now seeks to have its application dealt with under section 8 so that it might rely on section 11 "should its support in the bargaining unit fall below 40%." The time as of which the Board determines the degree of membership support in the union seeking certification is the date the application was made. The applicant has not claimed that there were more

employees in the bargaining unit *on the application date* that had refused to support it as a result of the employer's conduct.

20. Although both the applicant and responding party identified the same one project where the employees the applicant seeks to represent were working on the application date, the applicant claimed there were four employees in the bargaining unit on that date while the responding party initially maintained there were 10 employees at work in the bargaining unit. The applicant had challenged all 10 of those individuals and sought to add three persons to the list. The responding party prior to the Case Management Hearing agreed with one of the applicant's challenges.

21. It is therefore apparent that the applicant's inability to secure the requisite level of membership support among the employees in the bargaining unit before it filed its application was a result of it either not knowing who was at work on the application date or its view that the individuals who the responding party claimed were at work in the bargaining unit were not engaged in bargaining unit work. To that end, the Board refers to the following comment made in *L & L Painting and Decorating Ltd.* at page 389:

> In addition, it should be noted that the availability of an amendment does not mean that success on the section 11 application is by any means assured. If, for example, the Union has not obtained membership evidence from 40% or less of the bargaining unit because it was unaware of one or more job sites containing a large portion of the bargaining unit, its chances of success are likely limited. That is a matter to be determined when the Board considers the request for relief under section 11 on the merits.

I note that the Board in *Carlos Barbosa Concrete Limited* permitted the applicant to seek relief under section 11 by allowing it to amend its certification application so that it would be dealt with under section 8 after status disputes were determined.

22. The Board in *L & L Painting and Decorating Ltd.* was of the view that if the applicant's failure to secure the requisite degree of membership support was due to it not knowing about the job sites where the employees were working was a factor that would have to be determined when considering whether to grant section 11 relief. The applicant in this case has not suggested that the Board should defer consideration of its request to amend its application so that it be dealt with after the status disputes are determined.

23. In my view, the applicant's position in this case is much closer to the position taken by the applicant in *Sarnia Paving Stone Limited*, [2005] OLRB Rep. Nov./Dec. 1036 relied on by the responding party. In that case the applicant had sought certification under section 128.1 and moved to amend the application so that it would

be dealt with under section 8 after the responding party had filed its list. The applicant had estimated there were five employees in the bargaining unit but after the responding party had filed its response was faced with the possibility that eight more employees might be in the bargaining unit. The Board noted that the applicant in that case was seeking to amend the application as a precaution in the event the Board determined at a later date that it had filed membership evidence on behalf of less than 40% of the bargaining unit employees.

24. The Board refused to grant the requested amendment and directed that the matter continue to proceed under section 128.1. In doing so the Board noted that applicant's request for relief under section 11 arose after the responding party had filed its response. The Board in that case also noted that the unfair labour practice allegations related to conduct that had occurred after the certification application had been filed. The Board wrote at pages 1040-41:

> The possibility the applicant faces of "membership card support under 40%" is caused not by an alleged contravention of the Act, the keystone for the application of section 11(1)(b), but the potential inclusion of 8 more employees in the bargaining unit that the applicant estimated only had five (5) employees. As noted earlier, the applicant's situation has no connection with the alleged unfair labour practices, all of which post-dated the filing of the application.

Given that the applicant in this proceeding claimed that there were four employees in the bargaining unit when it filed its application and that it had filed membership evidence on behalf of more than 55% of those four employees, it appears that the applicant's inability to secure the requisite degree of membership support stems from the possibility that the Board might well find that there are many more employees in the bargaining unit than the applicant had estimated.

25. Although the Board recognizes that the applicant had indicated in its certification application and unfair labour practice complaint that it intended to seek certification under section 11 if necessary, I am satisfied that it sought certification under section 128.1 because it believed that more than 55% of the employees in the bargaining unit were its members on the date it filed its application. It did not assert in its application, unlike the situation in *Southside Construction (London) Ltd.* that it could not secure support from bargaining unit employees before filing its application as a result of the employer's conduct.

26. Although the applicant has indicated that it was not seeking a representation vote when it moved to amend its application so that it would be dealt with under section 8 of the Act, the Board notes that sections 8(2) and 8(3) of the Act require the Board to direct a vote if it determines that 40% or more of the employees in the bargaining unit appear to be members of the applicant based only upon the information in the

application and membership evidence filed by the applicant. In this case, had the applicant initially elected to have its application dealt with under section 8, the Board would have directed a representation vote given that the applicant had filed membership evidence on behalf of more than 55% of the employees it claimed were in the bargaining unit.

27. The applicant in its submissions contended that because it is not seeking to have a representation vote take place and as both the section 96 application and the certification application are to be heard together, the responding party cannot be prejudiced if the certification application is amended so that the applicant can seek relief under section 11 of the Act. It points out that the responding party's ability to give notice under section 8.1 is not a relevant factor since no vote will take place if the Board grants its requested amendment. I disagree.

28. If the amendment is granted, the application must proceed under section 8, and despite the applicant making it clear that it does not wish to have a representation vote take place, section 8(2) requires the Board to hold a representation vote. See, for example *East Elgin Concrete Forming* Limited, [2006] OLRB Rep. Sep./Oct. 706. Given that a representation vote must take place if the applicant's request to amend is granted, the responding party could be prejudiced if it is not able to give notice under section 8.1 of the Act. See *Southside Construction (London) Ltd.* at pages 862-63.

29. I am also of the view that permitting the amendment to the certification application at this stage of the proceeding when the parties have already exchanged status submissions and the Board has conducted a Case Management Hearing, could prolong rather than shorten the proceedings.

30. In these circumstances, the applicant's motion to amend its application for certification so that it is dealt with under section 8 of the Act is dismissed.

31. The application for certification shall continue to be dealt with under section 128.1 of the Act.

32. The Board has not yet determined whether the applicant can ultimately seek certification in these proceedings under section 11 of the Act. If the applicant wishes to maintain the position that it can rely on section 11 to seek certification in these proceedings despite its certification application continuing to be dealt with under section 128.1, that matter can be determined, if necessary by the panel of the Board assigned to hear these two applications.

ORDER OF PROCEEDINGS

33. The responding party contends that the applicant should proceed first with respect to the three individuals the applicant claims ought to be added to the list. The applicant submits that the responding party should proceed first to deal with the

allegations raised in the section 96 complaint. The applicant points out that it has requested leave to amend its certification application and if the amendment is granted no vote be directed. It asserts that its certification application in that circumstance rests in large part on the Board's determination of the application under section 96 of the Act.

34. The Board has dismissed the applicant's motion to amend the certification application. It must continue to be dealt with under section 128.1 of the Act. Whether remedial certification under section 11 is available to the applicant even if the Board does not order a representation vote under section 128.1(12) or 128.1(13)(b) of the Act at a later point in the proceedings is an issue yet to be determined in this proceeding. Should the applicant continue to seek remedial certification under section 11 despite the approach taken by the Board in *Southside Construction (London) Ltd.* and in subsequent cases, the panel of the Board assigned to the hearing of this matter may deal with it.

35. Although the certification application and the section 96 application are to be heard together, if the Board proceeds first to determine whether the three persons the applicant seeks to add to the list were employees in the bargaining unit on the application date, the result of those three status disputes may well have an impact on how these matter subsequently proceed.

36. The Board therefore directs the applicant to be prepared to proceed first to call its evidence to establish that the three individuals it seeks to add to the list were employees in the bargaining unit on the date the application was filed. Whether the witnesses who are called to testify with respect to those three status disputes may also give evidence that is only relevant to the issues raised in the section 96 application is a matter that the panel of the Board seized with these matters may determine when the hearing convenes. As the certification application and section 96 application are being heard together, any evidence heard by the Board in relation to those three status disputes will be applied when the Board deals with the issues raised in the section 96 application.

MOTION TO STRIKE OR DISMISS PORTIONS OF THE SECTION 96 COMPLAINT

37. The applicant's complaint under section 96 of the Act in Board File No. 2063-14-U makes allegations in relation to the conduct of the responding party that, according to the particulars filed, commenced in about August, 2014. It alleges that its organizing campaign began near the end of June 2014 and "was initially successful and a number of employees signed union membership cards." The complaint alleges that the responding party engaged in intimidation and coercion. It referred specifically to LE, an employee who had been confronted by a manager about speaking with an organizer working for the applicant, and to WP who, after being observed speaking to

the applicant's representative and signing an application for membership, had been terminated from his employment.

38. The complaint also makes a number of allegations in respect of 450477 Ontario Limited o/a Chartrand Equipment ("Chartrand"). Chartrand is alleged to have either sold its business to the responding party or that the responding party and Chartrand together constitute one employer for purposes of the Act. The relationship between the responding party and Chartrand is the subject of the application in Board File No. 1892-14-R that was adjourned *sine die* pending the disposition of these two applications on agreement of the parties by the Board in its October 24th decision.

39. The applicant in its section 96 application seeks a declaration that the responding party contravened the Act, and four specific orders[2] in respect of the responding party. The applicant seeks no remedies in relation to Chartrand. The applicant asserts that Chartrand became bankrupt on October 17, 2013.

40. The allegations made against Chartrand are set out in paragraphs 8 through 19 of Schedule B of the application in Board File No. 2063-14-U under the headings "History of Employer Misconduct" and "The Bankruptcy of Chartrand Equipment and the connection between Chartrand Equipment and EBC".

41. The responding party moves to strike paragraphs 8 to 19 on the grounds that those pleadings are "irrelevant and unnecessarily inflammatory." It contends that those allegations relate to an attempt "by a different local of the Union to organize employees of an unrelated company in a different part of the Province of Ontario." It points out that none of the individuals associated with Chartrand who had been previously found to have violated the Act are mentioned in the allegations. The responding party argues that it is improper to allow the applicant to try and "burden it with conduct attributable to another company." It also submits that even if alleged conduct of Chartrand some 8 years prior to the applicant's organizing campaign could be viewed as being attributable to the responding party, a proposition which it says should not be accepted, the responding party submits that it is improper to permit the applicant to rely on the alleged misconduct in one area of the province[3] to claim that its ability to organize employees in a different area of the province several hundred kilometres away has been adversely affected. More importantly, the responding party points out that there is

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[2] A direction that the responding party cease and desist from violating the Act; an order permitting the applicant to hold two hour long meetings with the employees of the responding party on paid time without any member of management present; an order certifying the applicant under section 11 of the Act and an order directing the appropriate notice prepared by the Board and decision be posted.

[3] According to the decision appended to the unfair labour practice complaint in *Chartrand Equipment*, 2010 CanLII 8376 (ON LRB), Chartrand was a family owned construction business performing "road building, sewer and watermain and heavy engineering construction work in northeastern Ontario from its headquarters in Timmins, Ontario." The allegations against the responding party arise in relation to the work it was performing at a sewer and watermain project in Sault Ste. Marie.

nothing in the applicant's complaint that alleges any of the responding party's employees were even aware of the alleged misconduct attributable to Chartrand.

42. The applicant in its response to the responding party's motion to strike out paragraphs 8 to 19 of its allegations does not suggest that the Board does not have the authority to grant the motion. It addresses the merits of the responding party's motion when it submits that its application in Board File No. 1892-14-R alleges that GC, an individual who the *Chartrand Equipment* decision noted at paragraph 8 was one of the two individuals who were in charge of the day to day activities of Chartrand and that GC, in particular, "bids and estimates projects and oversees all the work in the field". The applicant also asserts that it has claimed that some of the former employees of Chartrand are employed by the responding party.

43. The applicant maintains that some of the allegations it has made against the responding party involve a "physical confrontation". It then asserts "accordingly, the previous organizing campaign with Chartrand is relevant to the matters in dispute in the instant proceeding."

44. The Board is satisfied that although there is no specific provision in the Board's Rules that permit the Board to strike out portions of pleadings on the grounds that they are "irrelevant or unnecessarily inflammatory", Rules 5.1 and 39.1 when read together, suggest that the Board may strike out pleadings where the facts pleaded, even if true and provable, are not material or relevant to the orders sought in the application. Rules 5.1 and 39.1 provide:

> 5.1 Where a party in a case intends to allege improper conduct by any person, he or she must do so promptly after finding out about the alleged improper conduct and provide a detailed statement of all material facts relied upon, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.
>
> 39.1 Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all of the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing or consultation. In its decision, the Board will set out its reasons.

It seems to me that the reference in Rule 5.1 to "all material facts" a party seeks to rely on must be interpreted by reference to the contraventions alleged and the remedies sought. If the material facts pleaded cannot have any bearing on either establishing that a violation of the Act has occurred or the remedies requested, then those facts cannot be "material" and therefore ought not to be pleaded. Moreover, Rule 39.1 permits the Board to assess all of the facts set out in an application in order to determine if those facts, even if true and provable, do not make out a case for the remedies sought.

45. Moreover, Rule 1.2 permits the Board to deal with matters that are not covered by the Rules in a way that is similar to the way the Board deals with matters that are analogous. It seems to me therefore that the Board can, when appropriate, assess the factual allegations made in an application or response to determine whether those factual allegations are inflammatory, frivolous or irrelevant to the violations alleged or the remedies sought in the proceedings, and if they are, to strike them from the pleadings.

46. In this case, the responding party has raised a substantial argument in favour of striking those paragraphs of the allegations related to Chartrand particularly when it claims in its response to the application and in its motion that "none of the individuals in the earlier matter are identified in the Application as having acted improperly in any way and there is no indication that any employee of EBC was aware of the earlier matter or otherwise influenced by it." Nevertheless, the Board is not prepared as a preliminary matter to find that the applicant's allegations cannot possibly have any bearing on either the merits of its application or the remedies requested. I am of the view that the applicant ought to be able to proceed with the Chartrand portion of its application and seek to persuade the panel of the Board that ultimately deals with its application that the allegations it has made in relation to Chartrand are both material and relevant to establishing that the responding party has contravened the Act and that it is entitled to the remedies it seeks. To be clear, there is nothing in this decision that precludes the responding party at the hearing of these matters to renew its request to have the Board limit the scope of the complaint or the evidence that will be heard.

47. The motion to strike paragraphs 8 to 19 of Schedule B of the section 96 application is dismissed.

48. The responding party moves to strike paragraphs 22 and 38 of Schedule B of the application on the grounds that it does not comply with Board's Rules as there are inadequate particulars set out. The applicant in its submissions in response asserts that there are adequate particulars in those two paragraphs as initially pleaded but that without prejudice to that position, has filed further particulars.

49. The hearing of these matters is scheduled to begin in May, 2015. Whether there were sufficient particulars contained in paragraphs 22 and 38 of the application need not be determined as the applicant has filed additional particulars with its December 29th submissions in response to the responding party's motion that appear to address the complaint of inadequate particulars. There can be no prejudice to the responding party by permitting the applicant to rely on those additional particulars.

50. The Board is satisfied that paragraphs 22 and 38 of Schedule B to the application when read together with the particulars filed in Schedules A and B to the applicant's December 29th letter are adequate and meet the requirements established by Rule 5.1 of the Board's Rules.

51. The motion by the responding party to strike paragraphs 22 and 38 of Schedule B of the application is dismissed.

52. The responding party contends that paragraph 22 does not disclose a *prima facie* case of a violation of the Act and moves to have that paragraph struck.

53. The motion by the responding party to strike paragraph 22 because it does not disclose a *prima facie* case is dismissed.

54. Paragraph 22 asserts, among other things, that a manager employed by the responding party advised LE that if she joined the applicant "she will have to pay thousands of dollars to the Union in order to work." In my view, the applicant's allegation with respect to what the responding party said to LE is far more than advising an employee "that the financial costs of being a union member can be significant" as claimed by the responding party. One might reasonably interpret the statement a manager is alleged to have made as suggesting that LE's job security would be at risk if she joined the applicant and then did not pay "thousands of dollars".

55. In order for the responding party to succeed with respect to its motion in relation to paragraph 22, it must satisfy the Board "that there is no reasonable likelihood that a violation of the Act can be established on the facts as alleged"—see *J. Paiva Foods Ltd.*, [1985] OLRB Rep. May 690. I accept the applicant's submission that it is not "plain and obvious" that the applicant's allegations set out in paragraph 22 cannot be a basis for finding a violation of the Act.

56. The responding party moves to dismiss the complaint in relation to the allegation that its conduct contravened section 87 of the Act. The applicant in its reply submissions contends that its allegations relating to WP indicate that the responding party took action against him after it had filed its certification application in which it alleged that it was seeking section 11 relief as a result of the termination of WP. The applicant asserts that the responding party's conduct after the certification application was delivered and filed stemmed from it learning that the applicant was relying on what had occurred in relation to WP and therefore would expect that WP would be called as a witness by the applicant.

57. There are no additional facts pleaded that relate only to the applicant's allegations that the responding party also violated section 87 of the Act. Therefore, even if there is some merit to the responding party's motion, there is no utility in determining that issue at this stage of the proceeding since the same evidence that relates to the allegation made in respect of section 87 would also be received in relation to the other sections of the Act allegedly contravened by the responding party. In my view, whether the responding party's conduct also contravened section 87 of the Act can be determined, if necessary, after the Board hears the evidence and argument of the parties on the merits of the case.

58. The responding party's motion to dismiss the section 96 application in relation to an alleged violation of section 87 is dismissed.

PRODUCTION ISSUES

59. The applicant by letter dated December 17, 2014 seeks a Board order directing the responding party to produce a number of documents in various categories that appear to relate principally to the application for certification. It claims that it had sought those documents from the responding party on November 20, 2014 and had not received any response to its request.

60. The responding party objects to the Board making any production order in respect of the documents the applicant seeks that relate to the certification application. The responding party points out that the applicant had filed status submissions on October 2, 2014 in relation to the certification application and did not within the time fixed by the Board in its September 18, 2014 decision referring the matter to a Case Management Hearing for seeking further document production request any document production from the responding party. The responding party also submits that although the Board at the Case Management Hearing had dealt with a production request it had made of the applicant, it points out that the applicant had not raised any concerns with respect to the document production it had received from the responding party prior to or at the Case Management Hearing. The first time the applicant sought document production from the responding party was in its November 20th letter and only moved for a production order in its December 17th letter.

61. The Board in its October 24th decision following the Case Management Hearing wrote at paragraph 38:

> If either party moves for a Board order in respect of a preliminary or procedural issue, it must deliver and file it motion for a Board order on or before December 12, 2014. Any response to the motion for a Board order must be delivered and filed on or before December 19, 2014.

The applicant's production motion was made on December 17th which is after the time the Board had fixed for doing so.

62. Given that the applicant had not sought production from the responding party within the time fixed by the Board's initial September 18th decision, had not sought a production order at the Case Management Hearing and had not moved for a production order within the time fixed by the Board's October 24th decision, the Board in the exercise of its discretion, is inclined not to direct the responding party to produce any documents that it has not already produced or that it has agreed to produce.

63. In any event, after reviewing the applicant's request and the responding party's response on the merits of that request, the Board is not prepared to make the production order sought by the applicant but for the documents relating to the work done by LE and WP during the week prior to the application date.

64. The responding party contends that there are a number of documents sought by the applicant that it does not have in its possession. If there are no documents in its possession or under its control that are sought by the applicant, then the Board would not order such documents to be produced.

65. Despite the applicant's failure to make a timely production request and its failure to move for a production order within the time fixed by the Board's October 24th decision, the responding party has undertaken to produce a number of other documents requested by the applicant if such documents are found by the responding party and those documents are not subject to privilege.

66. The applicant requested documents relating to the employment of MY, LE and WP. The issue with respect to those three persons is whether they were at work on the application date as alleged by the applicant. The applicant had requested all employment documents relating to those three individuals.

67. The responding party indicated that it had provided time sheets and other documents relating to WP and LE with respect to the work they had done on the application date. In my view, if there are documents relating to their work during the week prior to the application date, those documents are arguably relevant and if they have not yet been produced, then the responding party ought to produce them forthwith to the applicant.

68. The responding party contends the employment of MY ended more than a week prior to the application date. It says it has produced all the documents in its possession relating to the cessation of MY's employment.

69. The other documents sought by the applicant as set out in its December 17th letter are not arguably relevant for the reasons expressed by the responding party in its December 29th submissions.

70. There is one category of documents sought by the applicant that warrants an additional comment. The applicant sought production of "original and digital copies of all documents disclosed by the Responding Party in its letter of October 2, 2014, including time stamping of when the records were created and all instances when the records were modified or edited after their initial entry." The responding party objects to that particular production request and suggests that the applicant is, in effect, claiming that the responding party has provided and filed fraudulent or falsified documents.

71. Unless the applicant can demonstrate that it had some reasonable grounds for alleging that the documents it had received from the responding party have been modified, falsified or are otherwise fraudulent, then the Board is not prepared to direct the responding party to produce for inspection the "original and all digital copies" of the documents the responding party had already produced to the applicant. In my view, the applicant's request is a classic example of a fishing expedition to discover whether there is some discrepancy between what has been produced and some earlier version of a document. The Board is not prepared to make a production order under those circumstances where the apparent purpose is to allow the applicant to find out whether some falsification has been perpetrated on it and the Board.

72. The motion by the applicant for a further production order, other than the documents relating to the work done by LE and WP during the week prior to the application date is dismissed. The Board directs the responding party to produce forthwith to the applicant the documents in its possession that relate to the work done by LE and WP during the week prior to the application date.

73. The responding party in its December 12th letter sought an order directing the applicant to provide additional documents and particulars. The applicant in its December 29th letter asserts that its letter provides the further particulars requested. It also contends that it has already provided the documents that had been requested, but for one category of documents.

74. The responding party seeks production of the telephone records of Richard May, one of the applicant's organizers for the period from May to October 2014. The applicant objects contending that those records not arguably relevant to any of the issues raised in the pleadings, are far too broad in time and infringe on Mr. May's privacy. The applicant submits that the production request for Mr. May's telephone records is a fishing expedition.

75. The responding party has not in its motion outlined the basis for claiming that Mr. May's records are arguably relevant. Nevertheless, the Board notes that the applicant at paragraph 22 of Schedule B to its section 96 application alleges that "Mr. May attempted to contact [LE] by phone on a number of occasions. She did not answer or return his calls." The Board also notes that the applicant at paragraph 38 of Schedule B alleges that "employees, including employees who previously supported the Union, did not return phone calls or messages".

76. In my view, any telephone records that disclose calls that were made by Mr. May to LE or received by Mr. May from LE during August and September, 2014 are arguably relevant and subject to redacting those parts of the telephone records that do not relate to telephone calls between Mr. May and LE, ought to be produced for the months of August and September, 2014.

77. There is nothing pleaded in the application to suggest that Mr. May left telephone messages for employees other than LE that were not returned. Moreover, it seems to me that even if Mr. May had made such calls to employees who he believed were supporters of the applicant, the disclosure of the details of those calls, and specifically the telephone numbers Mr. May called or from which he received calls may disclose the identity of individuals who are either members of the applicant or desire to be represented by the applicant.

78. The Board is not prepared to direct the applicant to produce Mr. May's telephone records for the period between May and October 2014, except in relation to LE. In my opinion, those records are either irrelevant or, if they are relevant because they disclose some communication between Mr. May and employees of the responding party other than LE, they ought not to be disclosed by reason of section 119(1) of the Act.

79. Therefore, the motion by the responding party for further production from the applicant is dismissed, but for Mr. May's telephone records in relation to the months of August and September 2014. The Board directs the applicant to produce forthwith the telephone records of Mr. May for the months of August and September 2014 in relation to any telephone calls between Mr. May and LE in August and September 2014 after those records have been redacted so as not disclose information about any other telephone calls made or received by Mr. May during that period.

80. In the course of reviewing the parties' submissions and preparing this decision, the applicant's letter of January 5, 2015 was brought to my attention. The applicant filed submissions in reply to the responding party's timeliness objections to the applicant's production request. The Board in the course of preparing this decision reviewed the applicant's reply submissions. The Board was considering the applicant's production request on its merits despite the responding party's objections before it received the applicant's reply submissions.

SUMMARY

81. The applicant's motion to amend the application for certification so that it is being dealt with under section 8 of the Act is dismissed. The Board has not determined whether the applicant can seek remedial certification under section 11 of the Act in these proceedings.

82. The Board directs the applicant to proceed first to deal with the status of the three individuals it seeks to add to the list.

83. The responding party's motion to strike some of the applicant's pleadings in the section 96 application and dismiss portions of the complaint on the grounds that those portions do not disclose a *prima facie* case is dismissed.

84. The Board has ordered some production requested by the applicant and by the responding party, as more particularly set out in paragraphs 72 and 78 above.

85. As I have now dealt with the motions filed by the parties pursuant to the Board's October 24th decision, this panel of the Board is no longer seized with these matters.

86. The hearings of these matters shall proceed as previously scheduled.

0661-14-R, 0685-14-R Operative Plasterers' and Cement Masons' International Association of the United States and Canada Union Local 598, Applicant v. **Empire Restoration Inc.**, Responding Party

Certification – Construction Industry – Sector Determination – Status – The issue common to both certification applications was a sector determination involving construction of two condominium towers being built in conjunction with the restoration of a historic brick building for use as a restaurant – The employer only performed restoration work on the historical building which was to be joined with one condominium where the restaurant footprint would extend into ground floor – The union asserted it was one integrated project and as the majority of the work related to construction of condominiums, it was in the residential sector of the construction industry – The historic building contained control room with systems related to both building and condominiums – Certain piping and electrical services also passed between structures, however the only entrance to the restaurant was through the historic building and the elevators in the building did not service condominiums – Overall management of project was carried out by one developer and one architect on a single construction site under a common construction schedule – The Board noted there is no single test for determining sector, it is a fact-specific analysis and necessary to look at end-use of project, work characteristics, and bargaining patterns – Work characteristics and collective bargaining patterns were neutral – The Board noted real issue was the appropriate end-use of project – The Board had to determine whether it was a single integrated project with single end-use, or whether it had multiple and distinct components with more than one use – The Board noted promotional materials, press clippings and signage offered as evidence was of little assistance in sector determination – The Board found historical building had "no meaningful connection" to condominiums and restoration work was "inherently distinct" from new construction occurring on site – Although the project was carried out by a single developer, this did not change the fact that responsibility for restoration work was clearly severable from responsibility for residential construction – The Board found the overwhelming use of historic building was commercial and took place in industrial, commercial and institutional sector of construction industry – Declaration made

BEFORE: *Eli A. Gedalof*, Vice-Chair

APPEARANCES: *Michael C.P. McCreary, Allison Shamas* and *Tony Mollica* appearing for the applicant; *Andrew Reynolds* and *Vito Caputo* appearing for the responding party

DECISION OF THE BOARD: February 20, 2015

1. Board File No. 0661-14-R is an application for certification being dealt with under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"), filed on June 3, 2014, for a bargaining unit of masonry restoration employees in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, and in all other sectors in OLRB Area 17 (the "ICI Application"). Board File No. 0685-14-R is an application for certification filed under section 128.1 of the Act on June 5, 2015, in which the applicant also seeks to represent masonry restoration employees, but which relates only to the non-ICI sectors of the construction industry in OLRB Area 8 (the "Residential Application").

2. Following a case management hearing, the Board, differently constituted, directed that the first issue to be determined in this matter is a common issue arising in both applications, concerning the sector in which the responding party's "Fashion House" project on King Street in Toronto (OLRB Area 8) falls. The applicant takes the position that the work on the project falls within the residential sector of the construction industry, and that certain employees on the project were therefore at work in the bargaining unit for the purposes of the Residential Application, and that certain employees at work on the project were not at work in the bargaining unit for the purposes of the ICI Application. The responding party takes the position that the work on the Fashion House project falls within the ICI sector. Following the case management hearing, the Board set a schedule for the filing of briefs and set the sector issue down for consultation.

Preliminary Issue

3. At the consultation in this matter, the responding party ("Empire") raised a preliminary objection to certain materials filed by the applicant in its reply brief, which the responding party contended did not constitute proper reply and which it argued the Board should therefore disregard. The Board gave a brief oral ruling with reasons to follow, in which it refused to strike the impugned paragraphs but advised that if the responding party required time to investigate the materials in the reply, the Board would grant an adjournment for that purpose. The responding party elected to proceed with the consultation.

4. The Fashion House project involves two newly built condominium towers and the restoration of a pre-existing and historic brick building known as the Toronto Silver Plate Building ("TSPB"), which was to become the flagship location of The Keg restaurant chain. In its reply brief, the applicant relied on a number of additional factual

assertions in support of its position that the condominium towers and the TSPB are one integrated project and that, as the majority of the project consists of the construction of the condominiums, the restoration work performed by the employees in dispute was in the residential sector of the construction industry.

5. The responding party objected to the applicant's reliance on these particulars on the ground that the extent of the integration of the two structures was a known issue from the outset, and the applicant should have included all of the facts upon which it relied in its initial brief, so that the responding party would have an opportunity to respond. With respect to a number of the applicant's assertions, the responding party advised that it was simply not in a position to confirm or deny them, since it had not sufficient time to properly investigate. The responding party relied on the Board's decision in *Bruce Power LP*, 2014 CanLII 53399 (ON LRB) ("*Bruce Power*"). *Bruce Power* was a jurisdictional dispute, but the procedure followed was substantially the same as that which was adopted for the purpose of determining this sector issue. In that case, the Board held that a party cannot split its case by holding back particulars which it knew or ought to have known would be in issue, filing them in reply when the party opposite will have no opportunity to respond. The Board noted that it is ultimately a question of ensuring fairness to the parties, while avoiding a never-ending series of replies and sur-replies (at para 11).

6. There is no doubt that the integration of the two structures was made an issue by the applicant in its initial brief, and there is also no doubt that the applicant included a number of previously unidentified particulars in support of its position on this issue in its reply brief. However, at least some of the further particulars are also arguably responsive to a number of particulars upon which the responding party relied in support of its position that the two structures are essentially independent of one another.

7. To the extent that some of the materials filed in reply could or even should have been included in the initial brief, the Board was still not prepared to preclude the applicant from relying on them. In *Bruce Power, supra,* among the Board's consideration was the fact that even without the impugned materials, the Board still had a substantial factual record before it. In the instant case, the extent to which the TSPB was or was not integrated into the construction of the condominiums was central to both parties' argument, and the further particulars relied on by the applicant were in some cases highly integral to its argument. To ignore them would have been to create an artificially limited evidentiary background to the Board's assessment of the argument, and the Board was not prepared to do so. However, as a matter of fairness and in recognition of the fact that these were factual assertions that could in many instances have been raised earlier and to which the responding party had not had a full opportunity to respond, the Board advised the responding party that it would be provided an adjournment and an opportunity to investigate and respond further if it wished to do so. As noted above, the responding party declined this opportunity, and the parties argued the matter on the merits.

The Sector Issue

Facts

8. In support of their respective positions, the parties filed numerous declarations, contracts, drawings and descriptions, setting out the nature of the Fashion House project overall, and the nature of the specific work performed by Empire. Further, at the consultation, the Board was able to review these materials with the parties, most significantly a number of the drawings which had been filed, and obtain some further clarity. Ultimately, although the parties characterized the integration of the new and pre-existing buildings very differently, there were very few material outstanding factual disputes between the parties, and the Board has had regard to the material filed in this light.

9. The Fashion House project involves the construction of two new condominium towers (the "King Tower" and "Adelaide Tower"), and the restoration of the TSPB, a pre-existing late 19th century factory building. It also involves, as described more fully below, joining the TSPB together with the King Tower, with The Keg restaurant occupying the ground floor of the TSPB and spilling over into a portion of the ground floor of the King Tower.

10. The TSPB is a three and a half story rectangular building clad in red brick, and is one of the only remaining buildings in the area of its kind. It has a number of features, including its shape and orientation, gable roof and brick chimneys, hipped roof ventilator, a southern façade with 11 bays, and a number of arched and flat-headed windows and openings, which are of historical significance. As a result of these and other features, the TSPB has been designated as a heritage building, and it was necessary to preserve these features in the development of the Fashion House project.

11. Empire's work on the project, and the work of its subcontractors, consisted entirely in the restoration of the TSPB, including work on all of the features identified above. Empire self-performed the masonry restoration on the exterior cladding of the building. Empire subcontracted all of the remaining restoration work, including restoration of a wood overhang, carpentry and painting in relation to wood-framed windows, slate roofing work, replacement of copper eavestrough, installation of metal framed windows and doors, structural steel framing, and the erection of the scaffolding used for all of the work, to a variety of specialty contractors.

12. The bottom floor of the TSPB is occupied almost entirely by The Keg restaurant. The only exceptions are a small room referred to as the "CACF Room" or "Central Alarm and Control Facility", and a small elevator lobby. Although the parties could not precisely identify the services housed in the CACF room, it is clear that it contained electrical control systems, whether for elevators or alarms or sprinklers, and that it contained at least some systems related to both the TSPB and the new-build condominium towers. The elevator lobby is for the elevator servicing the second and

third floors of the TSPB, which are to be leased out as commercial space, and does not service the condominium towers. The fourth half-floor of the TSPB is a mechanical room which services only the TSPB.

13. The footprint of the new-build condominium towers is separate from that of the TSPB building. There are 5 floors of underground parking. The first two floors of the parking garage are commercial parking, open to the general public, including but not limited to patrons of The Keg. The bottom three floors are reserved for residents of the buildings. The ground floor of the King Tower is occupied by a portion of The Keg, and two other commercial businesses. It also contains communal space related to the condominium, such as the entrance lobby, vestibule, elevators, office and mail room.

14. The TSPB is attached to the King Tower in two ways. First, and most significantly, a portion of one of the exterior walls of the TSPB has been opened up, and the gap between the footprint of the TSPB and the King Tower has been covered over with a roofed in and enclosed breezeway, so that the footprint of The Keg restaurant spans from the ground floor of the TSPB, through the breezeway and into the King Tower. A single concrete slab floor underlines the footprint of The Keg, spanning from the TSPB to the King Tower. However, with the exception of an emergency exit that is not generally open to the public, the only entrance and exit for The Keg is through the TSPB. The public, including the occupants of the condominiums, must go out onto the street and enter through the front entrance of the TSPB in order to get into The Keg. Second, one of the exterior walls of the TSPB also forms an exposed brick wall along one side of the entrance vestibule to the King Tower. This wall is not, however, a structural feature of the condominium tower (i.e. it is not part of the foundation for the condominium), but the vestibule essentially abuts up against the wall of the TSPB incorporating the exposed brick into the design.

15. In addition to the footprint of The Keg, the emergency exit, the CACF room and the wall of the vestibule, the applicant relies on certain other mechanical or service connections between the TSPB and the condominium towers. Although the parties' information about the nature and purpose of these connections was not extensive (a fact which is not surprising given Empire's limited role on the project), it appears that there are at least some piping and electrical services which pass from one building to the other. Further, the cold room for the Keg is located in a mechanical room in the parking garage of the King Tower, and the beer lines pass from that room to the bar located in the TSPB. The Keg will also use the loading and garbage facilities located in the King Tower.

16. The applicant also relies on the fact that while Empire's work may have been restricted to the restoration of the historical building, a number of other contractors on site, such as the rough carpentry, drywall, miscellaneous metal, landscaping, electrical, elevator and concrete forming contractors, worked on both the new towers and the heritage building. In some instances the work on both buildings was performed under a single contract, and in other instances there were separate contracts. Further, the overall management of the project was carried out by a single developer, with a single architect

on a single construction site under a common construction schedule.

Argument

The applicant

17. The applicant argues that the Fashion House project is a single, integrated residential building, in which the condominium towers essentially incorporate and "wrap around" or "encase" the pre-existing TSPB. The applicant relies on statements to this effect made by the developer in promoting the project and in obtaining approval for the development. The applicant also relies on the promotion of The Keg as forming a part of this single project. The applicant asserts that apart from preserving the historic façade of the TSPB, the project is no different than the majority of new condominium builds, which contain shared common and commercial space on the ground floor, and individual condominium units above.

18. The applicant relies on the Board's frequently cited decision in *The Corporation of the City of Sault Ste. Marie,* [2002] OLRB Rep. September/October 870 ("*Sault Ste. Marie*") in which the Board held that there is no single test for determining sector, and that it is necessary to look at the end-use of the project, work characteristics and bargaining patterns together. (See also *Yukon Construction Inc.* [2004] OLRB Rep. September/October 1001 ("Yukon Construction")).

19. The applicant relies on the Board's decision in *UCC Group Ltd.,* [2013] OLRB Rep. May/June 736 ("*UCC Group*") for the proposition that "end-use should be determined based on the end-use of the entire construction project". (See also *West York Condominiums,* [1983] OLRB Rep. December 2132 (*"West York*") and *Yukon Construction Inc.*). Since the vast majority of the Fashion House project as a whole consists of the residential condominium units, the applicant argues that the project as a whole must be residential. Indeed, citing *Yukon Construction* and the examples referred to therein, the applicant argues that there is an established practice concerning mixed-use condominium developments, and that they are consistently found to be in the residential sector, particularly in Board Area 8.

20. The applicant further argues that it is artificial to parse the project into new build and restoration components, given the extent to which contractors (albeit not Empire) worked on both aspects of the project, and given the joining of the two buildings together, the mechanical connections between the buildings, and the use of the condominium tower building for the operation of The Keg, including the use of the loading and refuse facilities, and the cold room in the parking garage. Citing the Board's decision in *Steen Contractors Limited,* [1989] OLRB Rep. November 1173 ("*Steen Contractors*"), the applicant argues that where multiple aspects of a project are closely integrated, they should be found to be in the same sector. Citing *PCL Constructors Canada Inc.* [2010] OLRB Rep. November/December 771, the applicant argues that the assessment of work must consider the project as a whole, and that subdividing the project

such that parties could find themselves working under multiple collective agreements on a single project would create labour relations harm.

21. The applicant argued that work characteristics is a neutral factor since there is no difference in performing masonry restoration of an exterior brick building in the residential or industrial, commercial or institutional building. Further, while the applicant did not rely on a collective bargaining pattern established on similar projects, it argued that the division of the work on the project into multiple sectors, and the application of multiple collective agreements, would result in labour relations harm, as noted above.

The responding party

22. Empire argues that this is not a case in which the "majority use" analysis is helpful. The Fashion House project is not just a new build condominium tower with a relatively small amount of commercial space at the bottom, where the question is whether it would make sense to split a single fully integrated building into more than one sector when the space is overwhelmingly residential. The decisions in *West York* and *Yukon Construction,* argues the responding party, are therefore not helpful. Rather, this is a case where the only work performed by the responding party was the restoration of a pre-existing, stand-alone building which, since the 19th century has only ever been used for industrial or commercial purposes, and which is being restored so that it can continue to be used for such purposes. Empire argues that the limited integration of the old and new buildings (essentially creating a breezeway connecting the two but otherwise maintaining two structurally distinct buildings) should not trump what is a very straightforward end-use analysis of Empire's work.

23. Like the applicant the responding party relies on the analysis set out in *Steen Contractors*, but argues that the facts support the conclusion that the restoration work on the TSPB was a distinct aspect of the project, and clearly falls within a different sector than the new-build condominium towers. (See also *Eastern Construction,* [2000] O.L.R.D. No. 4359, *C.S.B.I. Contracting,* [2003] OLRB Rep. Sept/Oct 737 (*C.S.B.I.*), *Barclay Construction Group,* [2008] OLRB Rep. March/April 136 and *Eastern Power,* [2014] OLRB Rep. Jan/Feb 18.)

24. To the extent that the developer refers to The Keg restaurant in promoting the condominium development, the responding party argues that this is no different than a developer referring to a TTC station or shopping or other nearby amenities as a selling feature for the condominium.

25. Neither, argues the responding party, is the fact of a single developer for the entire Fashion House project determinative. The responding party relies on the Board's decision in *Dufferin Construction,* [2001] OLRB Rep. March/April 323, which, after citing *Steen Contractors* and *Eastern Construction* with approval, finds that to give undue weight to the manner in which the project is contracted risks distorting the concept of sector in order to find that all of the work on the project falls within one sector.

26. The responding party did not agree that work characteristics were a neutral factor. The responding party argued that because the work on the TSPB bore no resemblance to the work performed on the condominium tower, this factor favoured finding that the work was in the ICI sector. Further, the responding party relied on the fact that while the condominium building was being constructed in accordance with the portions of the building code that related to "residential occupancies" the TSPB building was being construction in accordance with the provisions that pertain to "business and personal services".

Analysis

General Approach

27. The term "sector" is defined at section 126 of the Act as follows:

> 1. "sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heaving engineering sector, the pipeline sector and the electrical power systems sector.

28. The Board's approach to interpreting and applying this provision, although always highly fact-specific, has been fairly settled since the decision in *Sault Ste. Marie*; the Board will look to the end use of the project, work characteristics and bargaining patterns together. As the Board held, at para 39 of that decision:

> 2. …there is no single test which can be applied to determine sector, nor is there a descending order of factors which directs the Board to look at the "end-use" first and only later at work characteristics or bargaining patterns as a means of resolving doubtful cases. It is necessary to examine all the relevant factors. In most cases all of them will be present to some extent (or one will and the others will be neutral). It is where they do not point in the same direction that the Board must determine which sector the work falls in, having regard to both of the statutory definition of sector and the statutory purpose of sectoral divisions.

Work Characteristics

29. In my view, the work characteristics are a neutral factor in this case. There was no dispute between the parties that the specific masonry restoration work performed on the project is the same whether performed in the residential or ICI sector. The responding

party relied on the fact that the TSPB, unlike the condominium tower, is not being constructed under the residential provisions of the Building Code. However, the evidence before the Board is clear that this was a distinction that did not in any way alter the manner in which the work was carried out. Although regulatory distinctions might well result in different work characteristics in some instances, they simply do not in this particular case.

Collective Bargaining Patterns

30. Neither, in my view, is there a pattern of collective bargaining that points toward a particular result in this case. Neither party directed the Board to any other project similar to the Fashion House project, which involved the restoration of a pre-existing commercial or industrial building and the incorporation of that building as commercial space into an otherwise new-build residential project. The responding party relied on the fact that the applicant has a well-established bargaining history and is a designated bargaining agent for restoration work in the ICI sector. The responding party also argued that there is no established pattern of collective bargaining for restoration work on residential condominiums, since the majority of these building are simply not old enough to require the work. But no matter how well-established a bargaining pattern, it is not in my view relevant if it does not relate to the actual work in issue, or at least to work that is analogous.

31. The applicant argues that the division of the Fashion House project into multiple sectors would create labour relations harm, since it would result in the application of multiple collective agreements to the same parties on the same projects. In my view, while this is a potentially significant issue, it is best addressed under the *Steen Contractors* analysis set out below. The potential for collective bargaining problems is not the same thing as the existence of a collective bargaining pattern, which is what the Board examines under this factor. If there is no established pattern pointing one way or the other, as there is not in this case, the factor is simply neutral.

End Use

32. The real issue in this case, and the issue upon which both parties focused, is defining the appropriate end use of the project. This issue requires the Board to assess whether it is appropriate to consider the Fashion House project as a single integrated project with a single end use, or whether it has multiple and distinct components with more than one end use.

33. The parties referred to various characterizations of the relationship between the TSPB and the new condominiums in things like promotional materials, press clippings and signage. These materials contained statements such as that the new condominium "encases" the TSPB, which is "integrated" into the overall development, on the one hand, or which promoted The Keg Restaurant as an independent enterprise, without mention of the condominium tower, on the other. There is no doubt that the developer used the incorporation of the TSPB into the project as a selling feature. Ultimately, however, these

statements say more about the marketing of the project than they do about the nature of the construction. Aside from providing a reasonable basis upon which the examine the actual nature of the construction, they are of little assistance in determining within which sector the restoration work in issue in this application falls.

34. The applicant relies on *UCC Group* for the proposition that "end-use should be determined based on the end-use of the entire construction project". However, the Board in *UCC Group Ltd.* is not so unequivocal as that. Rather, citing *Steen Contractors*, the Board notes in *UCC Group* that (at para 50):

> 3. Where the work on the construction project is closely integrated, all of the work falls in the same sector. Where the work under examination is: (1) distinct; (2) the responsibility for it is clearly severable; and (3) the work patently falls into one of the enumerated sectors of the construction industry, it may fall in a different sector.

35. In *UCC Group*, the Board found on the facts before it that the work on the project in issue was sufficiently integrated that it ought to fall within a single sector. In *Steen Contractors,* in contrast, the Board found that the installation of storm sewers was sufficiently distinct from the construction of an ICI building that it was appropriately within a different sector. There is no dispute between the parties that the analysis set out in *UCC Group and Steen Contractors* is the correct approach, and I agree with and adopt this analysis. The question, then, is how this analysis applies on the facts of this particular case.

36. In my view, the critical fact in this case is that while the overall Fashion House project was integrated in a number of ways, including through at least some shared utilities and through the overlap of The Keg's footprint between the two buildings, there was no integration of the two structures vis a vis the restoration work. The restoration work performed by the responding party related only to TSPB building, and was directed toward the construction of The Keg restaurant and the commercial space to be leased out above it. Unlike the usual mixed use condominium construction referred to by the applicant, which involves the construction of a new building containing multiple floors of residential units and a relatively small amount of commercial space on the bottom, the responding party's project involved the restoration of a pre-existing structure to be used for commercial purposes, which will have no meaningful connection to the residential condominium units.

37. The work performed by Empire was clearly distinct from the rest of the work performed on the project. Simply put, Empire's work was restricted to restoring a previously existing commercial heritage building, so that it could continue to be used for commercial purposes. It should be noted that it is not just the manner in which the work was contracted that makes it distinct. I accept that the Board ought not to give undue weight to the specific manner in which the work is parceled out. Rather, on the evidence

before the Board the restoration work on this project was inherently distinct from the new construction that went on around it. While there is evidence of integration of the new and old buildings, there is no evidence that the restoration work was integrated into the new construction work in any meaningful way. The work on the entirety of the project was certainly coordinated, as evidenced by the construction schedule, but not integrated. The only aspect of Empire's work that was directly related to the construction of the condominium tower, was the one portion of exterior wall that formed the exposed brick interior wall of the entrance vestibule that abutted the TSPB. This is not, in my view, the kind of "integration" that could alter an otherwise clear sector determination.

38. In my view, the responsibility for the restoration work was also severable. Most significantly, it was performed on a separate building from the condominium tower, and to whatever extent the buildings were joined together, they were not joined together by the restoration work. The fact that the restoration work was contracted as a single package to Empire, who then divided the package between itself and its subcontractors, is not determinative of the severability of responsibility for the work, but it is certainly consistent with it. Ultimately, the restoration work was Empire's entire scope of work and responsibility on the project. Significantly, there was no evidence that Empire was responsible for any aspect of the new condominium construction, and indeed it could not have been since there was simply no restoration work to be performed on the new building. The fact that the Fashion House project was carried out by a single developer does not alter the fact that the responsibility for the restoration work was clearly severable from the responsibility for the residential construction in the adjacent building.

39. The final consideration is whether the work patently falls within a particular sector. In my view, it does. Although the CACF room may be associated with the residential towers, and although it is joined to the condominium tower, albeit to its commercial space as opposed to its residential space, the overwhelming end use of the TSPB is commercial. Absent the adjacent condominium tower, there would clearly be no dispute that the TSPB is a commercial building. Having found that the restoration work was both distinct and severable from the condominium construction, there is in my view no basis upon which the Board should conclude that this work was in anything other than the ICI sector.

40. As a note of caution, we emphasize that the Board's conclusion in this case relates only to the restoration work performed on the project, which was essentially a unique and highly discrete project in and of itself, within the overall Fashion House development. The applicant raised a number of challenging scenarios related to contractors who worked on both the new construction and the renovation of the TSPB building, and to work that spanned both buildings. Applying the analysis from *Steen Contractors* and *UCC Group*, it is possible that the Board would not reach the same conclusion with respect that other work as it has done with respect to the restoration work. The Board has recognized that a single project should not generally be fractured into multiple sectors, and the analysis in *Steen Contractors* and *UCC Group* guards against this outcome (See also *C.S.B.I.* at para 15). I accept, as the applicant argued, that

in many cases to do so could well result in labour relations problems. However, these concerns do not arise with respect to the restoration work performed by Empire on this particular project, and it is not necessary to determine how the Board would view the more difficult examples raised by the applicant here. Indeed, in the context of a certification application which affects only the parties involved, it would not be appropriate to do so.

Conclusion

41. For the foregoing reasons, the Board finds that the responding party's employees at the Fashion House project were at work in the industrial commercial and institutional sector of the construction industry on the application filing date.

The ICI Application (Board File No. 0661-14-R)

42. There were 7 employees that have been challenged by the applicant who were alleged to have been at work on the Fashion House project on the application filing date. With respect to three of those employees, MC, JM and IV, it appears that the only basis upon which they were challenged was the sector issue, and it appears that the parties would now agree that they were at work in the bargaining unit on the application filing date. The applicant has four other challenges, however, which identify bases other than the sector issue, and these disputes may be outstanding. Further, there are a number of additional challenges related to a Sudbury project and a Bracebridge project.

The Residential Application (Board File No. 0685-14-R)

43. The applicant has asserted that there were two employees at work in the bargaining unit on the application filing date, and seeks to add a third individual that the applicant asserts would have been at work in the bargaining unit but for an alleged breach of section 96 of the Act. The Board concludes that the two employees who were agreed to have been at work on the project, MC and IV, were at work in the industrial, commercial and institutional sector on the application filing date, and were not therefore at work in the bargaining unit. The three additional employees on the responding party's alternate list, AB, JJ and AS, all of whom were challenged by the applicant, are also excluded from the bargaining unit. Even if they were at work and performing masonry restoration work and were not managerial, the only site on which any party has asserted they performed work was the Fashion House project.

44. The result is that even allowing for the inclusion of the third individual whom the applicant seeks to include in the bargaining unit (about whom the Board heard no evidence and has drawn no conclusions), there would only be one employee at work in the bargaining unit. Absent any other considerations, the Board would dismiss this application. There is, however, an outstanding application for relief under section 11 of the Act, including a request for remedial certification, and the Board will not therefore dismiss the application on this basis at this time.

Next Steps

45. The parties are directed to consult with each other with respect to how the Board should proceed with this matter. If they are able to agree on the appropriate procedure, they should advise the Board of their agreement within 10 days of the date of this decision. If the parties are not able to agree on the appropriate next steps, they should each set out their position in writing within 10 days of the date of this decision. The Board will either determine the appropriate next steps on the basis of the parties' submissions, or may direct a brief conference call for the purpose of resolving this issue.

46. I remain seized.

1100-14-U The International Union of Painters and Allied Trades, Local Union 1891, Applicant v. **Erindale Painting & Decorating Inc.**, Responding Party

Intimidation and Coercion – Status – Unfair Labour Practice – The employer sought dismissal of this complaint because the individual who was the target of the employer's alleged contraventions of the Act was an independent contractor, and not an employee – The Board held that while sections 70, 72 and 76 can only be violated with respect to an employee, the word "person" in section 87 is broad enough to afford protection to individuals otherwise exempted from the Act – Motion dismissed; matter continues

BEFORE: *Harry Freedman*, Vice-Chair

DECISION OF THE BOARD: January 19, 2015

1. In its decision dated January 9, 2015 in this complaint under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") alleging violations of various sections of the Act and seeking declaratory and other relief the Board provided the applicant with an opportunity to make submissions with respect to the responding party's letter dated January 8, 2015 requesting that the Board dismiss the complaint rather than schedule it for hearing.

2. The applicant in its submissions filed January 16, 2015 opposes the responding party's request.

3. The complaint alleges that the responding party contravened sections 70, 72, 76 and 87 of the Act in respect of the actions it took against Luis Humberto Charry, an

individual who carried on business as a sole proprietorship under the business name Charry Painting, after it learned that the applicant had served a summons to witness on Mr. Charry in relation to the application for certification the applicant had filed in Board File No. 0077-14-R.

4. There were a number of status disputes raised in that certification application. The applicant had alleged that Mr. Charry and others who worked with him were dependent contractors and therefore were employees of the responding party. The responding party contended that Mr. Charry operated a business in the construction industry and employed the three individuals (together with Mr. Charry) who the applicant had claimed were the responding party's employees.

5. The Board in its decision dated December 11, 2014 determined that "Charry Painting was an employer that, through Mr. Charry, was engaged by the responding party to carry out painting work" and that other the three individuals associated with Charry Painting were not the responding party's employees.

6. The responding party in its January 8th letter moves for the dismissal of this complaint on the grounds that Mr. Charry is not an employee of the responding party. It contends that the applicant's "ability to succeed in this ULP rests on the finding that Mr. Charry is an employee of Erindale for purposes of the Act." The responding party also asserts that the applicant should have raised any allegations that that Mr. Charry had been intimidated or coerced because he was a witness in the certification proceeding in that proceeding. It points out that the applicant had said nothing during the hearing of that proceeding about the responding party's conduct in relation to Mr. Charry that allegedly contravened the Act.

7. It is clear that Mr. Charry was not at the times material to this application an employee within the meaning of the Act. He was an employer. The applicant points out that while Mr. Charry was not an employee under the Act he was nevertheless a "person" within the meaning of the Act and was, according to the applicant, protected against actions by the responding party that were motivated by Mr. Charry's support for the applicant and because he had been served with a summons to witness that required him to produce documents and testify before the Board.

8. While sections 70 and 72 of the Act prohibit an employer from taking action against a person with respect to his or her employment, the applicant expressly relies on both sections 76 and 87 that, according to the applicant, extend beyond an employment relationship and specifically refer to a "person" being protected against intimidation or coercion by reason of exercising rights under the Act or participating in a proceeding under the Act.

9. There can be no doubt since the decision of the Supreme Court of Canada in *Jarvis* v. *Associated Medical Services Inc.*, [1964] S.C.R. 497; 44 D.L.R. (2d) 407 that the rights and protections afforded by sections 70 and 72 of the Act are limited to

persons who are employees within the meaning of the Act. See *Ottawa General Hospital*, [1974] OLRB Rep. March 193. Subsequently, the Board in *Ottawa General Hospital (No. 2)*, [1974] OLRB Rep. Oct. 714 found that the rights conferred by section 3 and the protection afforded to someone exercising those rights under what is now section 76 does not extend to persons who are not employees because they exercise managerial functions. See also *A.A.S. Telecommunications Ltd.*, [1976] OLRB Rep. Dec. 751.

10. The Board recognizes that the decision in *Royal Shirt Company Limited*, [1993] OLRB Rep. Nov. 1177 found that the discharge of the plant manager, an individual who exercised managerial functions, and other non-managerial employees contravened what is now sections 70, 72 and 76 of the Act. Although the Board that case referred to *A.A.S. Telecommunications Ltd.* in discussing the appropriate remedial response to the violations of the Act in respect of the plant manager, that decision neither referred to nor dealt with the applicability of sections 70, 72 and 76 to persons who exercise managerial functions nor did it attempt to distinguish the analysis of that issue set out in *A.A.S. Telecommunications Ltd.* and in the *Ottawa General Hospital* decisions, *supra* or the principles discussed by the Supreme Court of Canada in *Jarvis* v. *Associated Medical Services Inc.*

11. It is clear to me that someone who is an "employer", or at the very least, is not an employee by virtue of carrying on business as a sole proprietor in which individuals are employed is in the same position as a person who is not an employee by reason of exercising managerial functions for purposes of enjoying the rights conferred by section 3 and receiving the protections provided by sections 70, 72 and 76 of the Act.

12. That analysis does not, however, deal with the protection afforded by section 87 of the Act to persons who are not employees by reason of exercising managerial functions. See section 1(3)(a) of the Act which deems a person not to be an employee if that person exercises managerial functions but which is expressly subject to section 97. Section 97 provides that for purposes of section 87 and a complaint under section 96, a "person" includes a person that is otherwise excluded by section 1(3).

13. Mr. Charry is not an employee because he is an independent contractor with employees. He is nevertheless a person who, in my opinion, is at least arguably entitled to the protections afforded by section 87 of the Act since he is a person who is testifying in a proceeding before the Board. This application alleges, among other things, that the responding party through its communications with Mr. Charry, had indicated that "there would likely be serious consequences including job loss" if he complied with his obligation to produce documents and testify at a hearing before the Board.

14. Therefore, the fact that Mr. Charry was found by the Board not to be an employee does not preclude the applicant from proceeding with this complaint on his behalf.

15. The responding party also submitted that the applicant's failure to raise the allegations related to Mr. Charry during the course of the status hearings that resulted in the Board's December 11th decision also precludes the applicant from proceeding.

16. In my view, there is no merit to the responding party's submission on that ground. The Board refers to and adopts the applicant's submissions set out at page 4 of its January 16th letter. As the applicant noted, the Board in its December 11th decision recorded at paragraph 1 that the status disputes were the only matters that needed to be determined to dispose of that certification application.

17. Moreover, the Board also refers to the decision of the Board (differently constituted) dated September 23, 2014 in which it was noted that the allegations and subsequent additional particulars that had been filed included allegations alleging a violation of section 87 of the Act. That decision also noted that the additional particulars might well constitute grounds for a separate complaint. The Board permitted the application to be amended by adding the additional particulars to the original application and left it "to the panel hearing the application to decide whether the allegations should be heard as a separate complaint or combined with the original allegations."

18. There was nothing in the Board's September 23rd decision that suggested that the responding party had requested that those allegations be dealt with in the course of the hearing dealing with the status disputes in the certification proceeding or that the Board had directed the parties to deal with those allegations in the certification proceeding in Board File No. 0077-14-R.

19. The motion by the responding party to dismiss this application is therefore dismissed.

20. This application is referred to the Registrar to be listed for hearing in consultation with the parties.

21. This panel of the Board is not seized with this matter.

1644-13-M George Brown College, Applicant v Ontario Public Service Employees Union, Local 557, Responding Party

Bargaining Unit – Colleges Collective Bargaining Act – Employee – Practice and Procedure – George Brown brought an application to exclude an employee, L, from the bargaining unit, invoking the managerial exemption – A Board of Arbitration had already determined L was not excluded from the bargaining unit pursuant to section 5(d) of the Act

– However, the Arbitration Board did not consider 5(f), as only the Board has jurisdiction to make a determination under that provision – The union brought an abuse of process motion: the union asserted the Board should adopt the factual findings of the Arbitration Board – The Board held inconsistent findings by the Arbitration Board and the Board based on the same facts would constitute an abuse of process – The Board determined George Brown's ability to call evidence must be limited to facts relevant to the applicability of 5(f) that were not already determined – There was overlap between the facts set out by the Arbitration Board and those advanced before the Board, with significant agreement respecting the relevant facts – The union alleged George Brown exaggerated the scope of L's duties and preferred the description of L's duties set out in the Arbitration Award – The Board determined, as an analysis under section 5(f) necessarily involves different considerations than under 5(d), George Brown will naturally want to shift its focus – As long as George Brown does not contradict the findings of fact set out in the Arbitration Award it is entitled to approach the relevant facts from a different angle than it did under 5(d) – The union did not point to any specific facts that contradicted the Arbitration Award – Given the factual findings of the Arbitration Board and the parties' agreement on a substantial amount of the facts, and in accordance with Rule 41 of the Board's Rules of Procedure, the Board determined this was an appropriate case to limit the parties' opportunities to present evidence by way of an agreed statement of facts – The Board laid out a draft statement of facts based upon the parties' submissions in order to provide the parties with a starting point and directed the parties to identify the limited areas in which they believe *viva voce* evidence is required – Matter continues

BEFORE: *Roslyn McGilvery*, Vice-Chair

DECISION OF THE BOARD: January 9, 2015

1. This is an application filed under section 71 of the *Colleges Collective Bargaining Act, 2008*, S.O. 2008, c.15 (the "CCBA"). The applicant (the "College" or "Employer") and the responding party (the "Union") are governed by a collective agreement between the College Employer Council and the Union.

2. The College alleges that the individual it employs in the classification of Country Manager (Korea), Cathy Hee Kyoung Lee, is excluded from the full time support staff bargaining unit pursuant to section 3(d) of Schedule 1 of the CCBA ("section 3(d)"). That section excludes individuals from the full time support staff bargaining unit who are employed in a managerial or confidential capacity within the meaning of section 5 of Schedule 1 of the CCBA. Specifically, the College asserts that Ms. Lee is excluded under section 5(f) of Schedule 1 of the CCBA ("section 5(f)").

3. In an award involving the same parties (*George Brown College and Ontario Public Service Employees Union Local 557*, an unreported decision of Arbitrator Jane

Devlin, dated May 15, 2013) (the "Arbitration Award"), the majority of a board of arbitration already determined that Ms. Lee was not excluded from the bargaining unit pursuant to section 5(d) of Schedule 1 of the CCBA. However, because only the Board has jurisdiction to make a determination under section 5(f) of Schedule 1 of the CCBA, the Arbitration Award did not consider that section. The College has consequently filed the instant application alleging that Ms. Lee is excluded from the bargaining unit pursuant to section 5(f).

4. The Union has brought a motion alleging that it would be an abuse of process to permit the College to recall the evidence that was already determined in the Arbitration Award. It asserts that this panel should adopt the factual findings set out by the majority of the arbitration board (the "Arbitration Board").

5. The Board considered the relevant authorities and by decision dated June 30, 2014, the Board stated:

> 19. Therefore, the question to answer in this motion is whether the Employer is seeking to relitigate material facts that were already determined by the majority of the Arbitration Board. I note that in bringing this motion, the Union has not identified the material facts that it says ought to be off limits to the Employer. I find that some of the facts that a tribunal would consider material to an assessment under section 5(d) might be considered material to a determination under section 5(f). In light of the Supreme Court of Canada's comments in *CUPE*, *supra*, and *Danyluk*, *supra*, I find that inconsistent findings by the majority of the Arbitration Board and this panel, based on substantially the same facts, would undermine the integrity of the labour relations system and constitute an abuse of process. The fact that the issues determined under section 5(d) and 5(f) are mutually exclusive does not allay this concern. As such, the Employer's ability to call evidence must be limited to facts that are relevant to the applicability of section 5(f) that were not already determined by the majority of the Arbitration Board as part of its ultimate conclusion under section 5(d).

6. The College was directed to file submissions pleading all facts that it would lead in evidence to support its assertion that Ms. Lee ought to be excluded from the full time support staff bargaining unit on the basis of section 5(f), making clear which facts support the conclusion that Ms. Lee's role has evolved since the Arbitration Board considered her job duties. The Union was directed to plead all facts that it relies upon in response to the College's submission. It was also directed to identify any facts set out in

the College's submission which it believed contradicted factual determinations that were material to the conclusion reached by the majority of the Arbitration Board. The College was given an opportunity to reply to the Union's submission.

7. The Board has had an opportunity to review the submissions that have been filed. Based on the parties' submissions, it is clear that there is significant overlap between the facts set out by the majority of the Arbitration Board and those to be advanced before this panel. Furthermore, there does not appear to be significant disagreement respecting the relevant facts in this matter. In its submission, the Union has indicated that most of the facts outlined in the College's submission, "were put in evidence by the College in the Devlin arbitration hearings and are set out in the Devlin award. As such most of those facts are accepted by the Union." While the Union proceeds to point out aspects of the College's submission which it disputes, it is clear that these disputes are mostly respecting how the relevant facts ought to be interpreted as opposed to disputing the facts themselves. There are instances in which the Union suggests that the College has overstated or exaggerated Ms. Lee's role in a specific area of work or that the Arbitration Award more accurately describes her role in an area of her duties. Given that a determination under section 5(f) necessarily involves different considerations than section 5(d), it is to be expected that in its submission, the College may have focussed on points that were not necessarily featured prominently by the majority of the Arbitration Board in its determination under section 5(d). As such, I am not concerned by the Union's general preferences for the manner in which certain aspects of Ms. Lee's role may have been described in the Arbitration Award. As long as the College is not contradicting findings of fact set out in the Arbitration Award, it is entitled to approach the relevant facts from a different angle than it did under section 5(d). Significantly, the Union has not pointed to any specific facts that directly contradict those set out in the Arbitration Award.

8. Rule 41 of the Board's *Rules of Procedure* applies to proceedings under section 71 of the CCBA. Rule 41.3 specifically provides:

> Where the Board is satisfied that a case can be decided on the basis of the material before it, and having regard to the need for expedition in labour relations matters, the Board may decide an application by limiting the parties' opportunities to present their evidence or to make their submissions, or without a hearing.

9. Given the parties' apparent agreement on a substantial amount of the facts in this matter and because the parties have already received an award from a decision-maker which has significant factual overlap with the anticipated evidence in this matter, the

Board intends on receiving the vast majority of the evidence in this proceeding by way of an agreed statement of facts. In accordance with Rule 41.3, this is an appropriate case for the Board to limit the parties' opportunities to present evidence. The parties will have an opportunity to meet with a labour relations officer ("LRO") on January 22, 2015 in order to finalize an agreed statement of facts.

10. Based on the parties' submissions, the following appear to be facts upon which an agreed statement of facts could be based:

Background to the Country Manager, Korea Position

1. George Brown College currently has three full-time and one contract Country Manager positions which are responsible for the following geographic regions:

    - Korea
    - Europe & the Americas
    - South Asia and the Middle East
    - Rest of Asia (Vietnam, Japan, Thailand, Indonesia, etc.)

2. The Country Manager, Korea position is held by Cathy Lee.

3. The Country Manager position is in the International Department of the College, reporting to the Dean of International (also the Dean of the Centre for Hospitality and Culinary Arts). The International Department was established in 2006 as the International and Immigrant Education Division and included three specific "branches" with separate mandates: the International Department, often referred to as the International Centre, the Immigrant Education Department and Language Studies, which involves programming in English as a Second Language ("ESLP). In early 2012, the Immigrant Education and the ESL School were moved to another academic division.

4. The mandate of the International Centre was and is to advance the College's international strategy, including elements or "pillars" of that strategy such as student recruitment and retention, partnership development and academic internationalization including student study

abroad and work abroad opportunities, faculty professional development and internationalization of the curriculum.

5. The Division is represented by the Director of International on the Academic Management Committee of the College which is chaired by the Senior Vice-President Academic and comprised of Deans from each of the academic Divisions.

Evolution of the College's International Strategy

6. The College's international strategy has undergone significant change over the last twelve to fourteen (12-14) years in response to global developments.

7. Prior to 2000, George Brown College and many other colleges and universities in Ontario and Canada focussed primarily on the recruitment of inbound foreign students.

8. However, with the development of globalization, it became necessary for the College to shift its focus from pure recruitment to the development of graduates with international competencies and cross-cultural skills. It was clear by 2003 that a new approach to international strategy was necessary and the College set out a conceptual framework for the approach in a Strategic Plan which was intended to expand the international experience for all students and faculty.

9. As set out in the Strategic Plan, the international strategy would better benefit students and employers if the College was producing "job ready" graduates who have international exposure through global classroom discussion, curriculum content and international study and work abroad experience as well as international life experience.

10. Commencing in 2004 the College began placing significant emphasis on the development of partnerships with academic and industry partners around the work which enabled a different model of recruiting, field placements which provided students with exposure to the international workplace as part of their educational experiences, and development opportunities for faculty.

11. In response to the changing focus of the College in international strategy, the International and Immigrant Education Division of the College was created in 2006, as explained in paragraph 3 above.

12. As part of the creation of the Division, the College appointed Lorraine Trotter as Director (subsequently Associate Vice-President) with a direct reporting relationship to the newly-established position of Vice-President of International and Applied Research within the Colleges academic portfolio. Prior to the creation of the Division, responsibility for international activities rested with a Director who reported to the Vice-President, Finance and Administration.

13. The Director's/Associate Vice-President's initial mandate was to assess the global marketplace, the dynamics of the international education sector, and the progress that the College had made in implementing the conceptual framework set out in the Strategic Plan in 2003 in order to find ways to accelerate the development of the international strategy in keeping with the framework of the Strategic Plan.

14. In order to fulfill her mandate, the Associate Vice-President (AVP) hired several new employees with global experience to join the international team and fill the role of the newly-created Manager, International Recruitment position for the College.

15. The Manager, International Recruitment position developed into the Country Manager position that is at issue in this Application. The new JFSQ for the Country Manager position was formalized in March 2013 to reflect the work already being done and replaced the Manager, International Recruitment JFSQ.

16. For the balance of the Agreed Statement of Facts, the position at issue will be referred to as the Country Manager.

17. Ms. Lee, who was hired in 2006, was assigned responsibility for South Korea which, at the time, was a critical market for student recruitment. Prior to her

employment with the College, Ms. Lee worked as an Acting Trade Commissioner at the Canadian embassy in South Korea providing strategic advice to senior executives of Canadian exporters and investors seeking to enter the Korean market.

18. As part of fulfilling her initial mandate, the AVP travelled to South Korea with Ms. Lee in 2006 so that Ms. Lee could educate her and other members of the international team on matters such as cultural norms, business and partnership opportunities for the College, the College programs that would be attractive to South Korean students and how programs should be modified for those students, as well as introductions to senior executives with target Korean academic institutions.

19. Ms. Lee also offered advice on which Korean programs and institutions would offer the most beneficial opportunities for College students and staff to obtain the type of international experience which was at the core of the College's internationalization strategy.

20. The AVP relied on the Country Manager's advice in this regard as the Country Manager is the expert for the assigned region. The Country Manager, Korea was hired for her high levels of expertise in academic and business matters.

21. During 2006 and 2007 the AVP worked with the Associate Directors and Country Managers to understand the markets and to identify the changes that needed to be made in the College's international strategy.

22. In 2007 and 2008, the Associate Director and Country Managers worked with the Deans and academic Chairs of the various academic divisions to advise them on opportunities for the College.

23. Based on these experiences in the different markets, the AVP led a two year process commencing in 2008 and continuing until 2010 that resulted in a completely revised international strategy for the College. She could not have completed this process without relying on the judgment and advice of the Country Managers in respect of their individual markets, trends around the world, and

strategies for strengthening the College's competitive positioning and partnerships, as part of the International Team.

2008-2010

24. In the fall of 2008, at the outset of the two year process, the International and Immigrant Education Division produced a document entitled "International and Immigrant Update, Strategy Review, Portfolio Analysis & Enrolment Planning", which was the product of the strategic work, analysis, information gathering, prioritizing and detailed country planning that had commenced in 2006.

25. The Update contained a number of recommendations for academic divisions which were based on information and strategic advisory input obtained from the Country Managers. The Country Managers provided input regarding programs that were attractive to students in the different regions, developed strategies for building portfolios of agent partners, identified opportunities for growth including assessing and developing models for partnership tailored to the needs and dynamics of their unique markets, and advised how recent changes in immigration policy would affect certain markets.

26. The Update also referenced certain partnership opportunities with academic institutions in South Korea which were assessed and recommended by the Country Manager, Korea, as will be discussed in more detail below.

27. The International and Immigrant Update was presented to members of the College's senior management in the fall of 2008 and was also discussed in the College's Portfolio Review Process ("PRP") which took place at that time. The PRP involves a review of the College's academic endeavours, including programs and learning opportunities, with an in-depth review occurring every five years and mini reviews being conducted in years two and/or three.

28. Based on feedback from the 2008 PRP, the international team decided that it was necessary to develop a

comprehensive new international strategy for the College.

29. Preliminary work on the new international strategy by the Country Managers and the Associate Directors began in early 2009. In August 2009, a briefing was conducted for members of the College's senior management team and, at that time, invitations were extended to various individuals to join a Strategic Working Group to develop the new strategy.

30. In contrast to the 2008 process when the Update was prepared by the International and Immigrant Education Division and representatives of academic divisions were consulted, representatives of academic divisions were actively involved in the 2009 Strategic Working Group. The AVP, the Associate Directors and the Country Managers were part of the Strategic Working Group with Country Managers participating fully in the discussions and sharing their insights regarding their markets and trends in those markets.

31. The Strategic Working Group met collectively on three occasions between October 2009 and March 2010, with further discussions occurring in subgroups as drafts of the strategy were circulated among members of the group.

32. The process of developing the College's new international strategy was complicated, given the number of countries, programs and pillars of the strategy that were engaged, constantly evolving international markets and an emerging competitive environment.

33. In the process the Country Managers were tasked with deciding on the programs that they would focus on in their countries and the strategic pillars they would pursue, and had input on which countries/regions should be priorities for greater development. The opportunities that the Country Managers generated were put to the Working Group as a means to set the direction for the strategy and develop a roster of strategies and initiatives.

34. The Country Manager, Korea participated in discussions within the Strategic Working Group that led to the

recommendation to pursue two new strategic pillars; namely, research and innovation and global industry partnerships. The Memorandum of Understanding signed between the College and Jeju University in South Korea, as will be discussed further below, was an example of the process of developing global industry partnerships as it enabled a 3-way partnership between GBC, a host academic institution in Korea, and the foreign academic institution's industry partners (in this case, a hotel chain).

35. In the end, the members of the Strategic Working Group unanimously recommended the new strategy to the Senior Management Committee of the College, which was accepted. Some minor changes were later made to the strategy in order to align it with the College's strategic 2020 plan, which is a ten year plan designed to guide the institution from a strategic perspective.

36. The work of the Strategic Working Group was confidential and no bargaining unit members participated.

Program Development

37. Beginning in 2007, meetings took place involving Associate Directors, Country Managers and Deans, Directors and Chairs of academic divisions to discuss initiatives that would support the College's strategic goal of preparing graduates for a global workplace. Providing an international experience for students was deemed to be an integral element and it was established that study abroad and field placement opportunities were to be accelerated. Country Managers advised Deans, Directors and Chairs on appropriate opportunities, partners and initiatives. This advice included effective decisions by Country Managers on which opportunities to pursue and not to pursue. Since late 2009 or early 2010, depending on the academic division, such structured meetings have been held on a quarterly basis.

38. It was and is the role of the Country Managers on behalf of the Division to meet with the academic leadership to plan new partnerships, assess existing partnerships and evaluate curriculum. The AVP was not always present at

those meetings. The Country Managers managed the portfolio of partnerships, academic activity and recruitment activity in their assigned countries. In this capacity, they briefed the academic division leaders including the Deans, Directors and Chairs on matching partners with academic needs, developing strategies on relationship management and directing academic leaders to act on engaging with partners.

39. In 2008, the Country Manager, Korea was also involved in discussions with other Country Managers, Associate Directors and the AVP regarding the programs that were most effective in particular markets and those that could be modified to meet the needs of students. In some cases, these discussions resulted in recommendations for new academic programs or changes to existing academic programs.

40. By 2008 it was also part of the role of the Country Manager, Korea to meet with Chairs and Directors of academic areas to discuss matters such as contract training, customizing programs and promoting special ESL offerings in South Korea. In those meetings, the Country Manager typically provided information about what a particular client wanted and the Chairs and Directors advised how best such a request could be delivered. In case of ESL, the Chair often sought the Country Manager's advice and direction on how to make the program more marketable in Korea, and changes were implemented (e.g. Establishing equivalency between ESL levels and other standardized tests such as TOEFL or IELTS, providing students with more extracurricular activities and volunteer opportunities in Toronto.)

41. In 2008, such meetings generally took place every two to three months and lasted from half an hour to three or four hours but have become more frequent since that time as the Country Manager role has evolved.

42. In 2008, the Country Manager submitted a proposal to the College which involved South Korean nursing students receiving training in English and opportunities to observe at Canadian hospitals. She discussed the proposal directly with the Chair of Nursing and the

Chair of ESL. The proposal was not ultimately pursued only because the Chair of Nursing determined that it was not feasible to arrange placements for more South Korean students at Canadian hospitals which was basically a capacity constraint.

43. The Country Manager did not require the approval of the AVP or the Associate Director to enter into discussions regarding the proposal.

44. In 2010 the managers in the International Centre, including the Country Managers, and the Director of the Centre for Business met to discuss program development.

45. As a result of proposals made by the Country Managers and Associate Directors, the Centre undertook to create certain programs which would be attractive to students in the international markets. Those programs are being implemented by the College between 2013 and 2018 for both domestic students and for the international market (for example, a post-graduate program in wine and beverage management appealing to Asia and India as those markets develop as wine-consuming nations).

46. Country Managers also work with various Academic Divisions in respect of Program Development, particularly since 2010.

Partnership Development

47. The Country Manager is responsible for partnership development with academic institutions and industry partners in Korea and has been increasingly focused on that aspect of her job duties since approximately 2008. This is based on the commitment in the College's Academic Plan to expand the availability of International experiences to all students and faculty across the College.

48. In that respect the Country Manager is responsible for identifying new partnerships opportunities in Korea and for negotiating with potential institutions regarding the types of programs to be offered and the number of students involved. Consequently, the Country Manager

plans and manages a complex portfolio of academic institution relationships and industry relationships in the assigned countries.

49. In respect of Korea partnerships, the Country Manager is responsible to assess the value of any proposed partnership and to make recommendations to the Dean and to representatives of the relevant academic division at the College regarding the proposed partnership. In addition to assessing any proposed partnerships, the Country Manager actively seeks out new partnerships in the market and creates new partnership models that are then put forward to the academic divisions. This includes determining the structure of partnership appropriates that are appropriate to the culture and environment in the Country Manager's region or responsibility, and anticipation of changes in those markets requiring evolving models.

50. Assessment of potential partnerships must be done in consideration of the International Institutional Linkages component of the College's internationalization strategy to ensure that the College will obtain the full benefits which result from College faculty development and study and work abroad opportunities for College students as well as program development. Such assessment involves consideration of a complex array of issues including academic, operational and financial models, faculty and student satisfaction, personnel safety, business and financial risk management, brand management, enrolment planning, immigration and student mobility regulations, etc.

51. The Country Manager, Korea is required to ensure such linkages enhance George Brown's brand in South Korea and that they met the criteria established for the selection of international partners. This includes assessing on behalf of the College whether potential partners have goals, culture and operating principles compatible with the Colleges; whether they demonstrate the desire and potential to invest in and sustain a long term relationship with the College and whether they have the potential to support more than one international activity with the College.

52. The Country Manager has authority to determine whether a partnership will be pursued by the College and, although she would advise the Dean (previously AVP) of the decision not to pursue a particular partnership, her judgment on a particular partnership is determinative. The College would not pursue a partnership opportunity in Korea which was not recommended by the Country Manager.

53. On the advice of the Country Manager, the Dean has travelled to Korea to visit a potential partner and has facilitated a visit to the College by representatives of the potential partner where recommended by the Country Manager.

54. The Country Manager plans and negotiates partnerships on behalf of the College. The final partnership agreement is signed by the President of the College or the Senior Vice-President Academic depending on the nature of the agreement, as determined by the governance requirements set out by the College.

55. Once a partnership agreement has been entered into, the relationship is managed by the Country Manager, and the Country Manager works directly with the relevant academic Chair to support the Chair and other academic staff in their interaction with the partner.

56. From time to time the Dean would brief the President of the College on partnership activities and all information for the briefing would be provided by the Country Manager. Further, if new activities related to the partnership were to be undertaken by the College, these activities would be discussed with the Country Manager.

57. Examples of partnerships established by the Country Manager are the Hallym University partnership, the Kyung Yee University partnership and the JeJu University partnership.

58. The Hallym University partnership provided for a student exchange in the summer of 2009 and set out provisions which would apply to that exchange as well as future exchanges. In the Memorandum of Agreement, the parties also agreed to explore the potential for future

joint post-secondary programs and faculty/staff exchanges.

59. The exchange in the summer of 2009 involved the College accepting two students from the University into one ESL session in exchange for four students from the College participating in a four week Korean language and culture summer program at the University.

60. In reaching this partnership agreement. the Country Manager first contacted Hallym University in 2007 and negotiated the terms of the student exchange program, including the number of students involved, over a two-year period ending in 2009.

61. When the partnership was finalized the Country Manager recommended the agreement to the President of the College and her recommendation was accepted.

62. During the process of negotiation for this partnership the Country Manager reported to the Associate Director and the-then-AVP. In finalizing the partnership agreement, she relied on a template document from the College and provided a copy of the proposed agreement to the Associate Director and the AVP before recommending it to the College. Both the Associate Director and the AVP accepted her recommendation.

63. Although the Memorandum of Understanding with Hallym University made provision for a governance committee which was to consist of a number of senior managers of the College and the University, no committee was ever formed. Instead, the Country Manager continued to be the College's sole point of contact with representatives of the University.

64. The Memorandum of Understanding with Hallym University took a lengthy time to negotiate because it was one of the early agreements with an institution in South Korea. Subsequent memoranda have been negotiated more quickly and negotiations for the most recent memorandum took approximately six months.

65. In 2009, the Country Manager was involved in conceptualizing and negotiating a Memorandum of

Understanding between the College and Kyung Hee University for a study abroad program on global governance and East Asian civilization.

66. Negotiations took place over a period of six to eight months and the Memorandum of Understanding was modelled on the existing memorandum between the College and Hallym University.

67. Students who completed the program provided for in the Memorandum received two general education credits, a proposal the Country Manager took directly to the College's Chair of General Education who reviewed the curriculum and approved the credit.

68. The Country Manager also conceptualized and negotiated a Memorandum of Understanding between the College and Jeju National University, which was signed in 2011.

69. The agreement provides students in the College's hospitality program with a study abroad opportunity as well as an opportunity to work at a hotel partner, which represented the first time the College had successfully integrated an industry partner into its program in Korea.

70. To do so, the Country Manager discussed the types of hotel partners that would be appropriate for the College with representatives of the University and, based on those criteria, the University selected the partner.

71. The first students to participate in this program travelled to Korea in the summer of 2012.

72. The Country Managers do not only approve partnership opportunities; they also decline them.

73. In 2008 the College had identified three institutions in South Korea to be assessed as potential partners for the College in the fields of hospitality and culinary arts. As a starting point the intention was to permit program articulation, which would have enabled Korean students to receive training at a higher level at the College.

74. In assessing the proposed partnership the Country Manager determined that the students did not have sufficient proficiency in English and, as a result, she recommended that articulation agreements not be pursued. Her recommendation was accepted by the AVP and the partnerships were not pursued any further.

75. Also in 2008, there was a recommendation in the Update to pursue partnerships in South Korea in the field of early childhood education ("ECE"). The respective Dean for the academic Division delivering ECE programs was involved in this discussion. The Country Manager, Korea disagreed with this recommendation as it was her view that it was best to begin by establishing partnerships in hospitality in that country. The academic Dean accepted her recommendation and acted upon it.

76. As a result, she made the unilateral decision not to pursue partnerships in ECE in Korea, which she believed were premature because of the lack of a strong partner and constraints on the College's capacity to accept international students in ECE programs. The AVP accepted her recommendation in this regard.

77. As the internationalization program is continuing to evolve, the nature and scope of partnerships is evolving. In addition to specific efforts in Partnership Development (e.g. - industry partnerships), Country Managers are responsible for building a portfolio of partnerships which are categorized in levels 1 to 4 of the College's partnership framework. The partnership level and the partnership model is determined by the Country Manager based on targeted outcomes as projected by the Country Manager.

78. In 2012, the Canadian Trade Commissioner in Manila contacted the Country Manager for Korea with an approach to partner by the Endurun Group of Institutions. Upon conducting a thorough review of the proposal, the Country Manager advised the Acting Director, International with her recommendation to pursue the partnership in only Hospitality and decline the partner's proposal for a partnership in Business. The respective Deans accepted this advice.

79. Also in 2012, the Country Manager Korea determined that it would be appropriate to develop a portfolio of articulated partnerships with language schools which would feed cohort enrolment to the College. In each of the cases of Pan Pacific College Vancouver, Cornerstone and Upper Madisson College, the Country Manager developed partnership models and conducted negotiations with the senior administrative and academic leadership in the partner institutions.

80. Upon the establishment of the partnership operating models, the Country Manager engaged the Chair of the School of ESL to negotiate the desired pathway. The Chair accepted the recommendations of the Country Manager and consequently, the partnerships were established.

Decision-Making Authority

81. The Country Managers are expected to exercise independent judgement in determining how to most effectively implement the various pillars of the College's international strategy in order to achieve the College's internationalization strategies.

82. In the particular country or region in which they work, they are considered to be a senior level representative of the College. In Korea, this is a culturally important element of the role that the Country Manager plays.

83. One of the key pillars of the new 2010 international strategy was academic delivery abroad. The Country Manager, Korea determined that this particular pillar would not be effective in Korea given the preferences of those students, and the structure of the educational system in Korea at that time, and she recommended to the College that the pillar not be pursued. The Dean accepted her recommendation in that regard and academic delivery abroad has not been pursued in Korea to date.

84. Country Managers also play a significant role in identifying specific areas of growth and speciality for the College in the future based on their particular knowledge of their markets. This confidential input

contributed to development of the submissions made by the College to the Ministry of Training, Colleges and Universities regarding the College's intended differentiation strategy as required by the MTCUs Strategic Mandate Agreement undertaking in 2012 and 2013. This Strategic Mandate Agreement was released by the Ministry on 7 August 2014.

85. Similarly, in 2013 the Country Manager had significant input and control over the College's involvement in the Philippines. In that instance, the Country Manager did not support the College's intention to enter the Philippine market, despite the support of senior management to do so. Based on the Country Manager's recommendation, the College did not enter the Philippine market.

College Management Meetings

86. The Country Managers are required to attend the College's annual Management Retreat, which is attended by all members of management and takes place over a period of two days. All matters discussed at the annual retreat are confidential.

87. The College's long term strategy, which is discussed at the annual retreat, informs the Country Managers' individual business plans and as well as the types of partnerships they pursue in their regions. Organizational objectives for the future are set at the Retreat. The Country Managers participate in discussions at the conceptual level concerning the future of the College and provide input in focus group discussions on specific initiatives.

88. All College Divisions are represented at the annual retreat and Country Managers are expected to, and do, provide input with respect to matters relating to international issues and initiatives relevant to the concerns and goals of the College.

89. The Country Managers would be unable to perform their duties without information as to the College's long terms objectives as discussed at the annual retreat.

90. The Country Managers also attend Divisional planning meetings, which take place at least three times a year with each meeting lasting a half to a full day. These meetings are attended exclusively by members of management including the Dean, Director of International, Director of International Admissions and Student Services, the Associate Directors and the Country Managers. [Note: The Dean's administrative assistant attends these meetings in a support staff role to take minutes but does not contribute to content.]

91. During these meetings, there is a discussion of business plans, progress against goals, and the Division's priorities for the year. There is also a discussion of enrolment targets, increases in tuition fees for international students and commission policy as relates to agents.

92. Country Managers must be in a position to provide input into the goals and objectives set at Divisional planning meetings and to report on performance of their region or country against goals, and they base their business plans on those goals and objectives.

93. Staffing decisions are discussed at Divisional planning meetings and the meetings are considered confidential by the College. Discussions in Divisional planning meetings, including input from the Country Managers, led to the creation of an additional College position to focus on other areas in Asia, more specifically Japan, Taiwan and Vietnam, as emerging markets. There have also been discussions leading to increased administrative assistance with respect to international admissions due to the increased volume of applications.

94. The Country Managers also attend departmental meetings that take place each month. These meetings are attended by the Dean, Director, the Associate Directors and the Country Managers. The Finance Manager, and the Manager of International Marketing and the Manager of International Partnerships also attend.

95. Discussions during departmental meetings relate to internal and external matters particular to individual international markets that can affect the College's

position in that market. One example would be the impact of changes to language proficiency requirements by the College. Moreover, Country Managers also attend various meetings in which confidential information is regularly discussed, including information relating to sensitive labour relations, financial and strategic issues.

Business Plans and Country Strategies

96. Country Managers are required to prepare a business plan annually setting out their goals and objectives for the year and the resources needed to meet those goals and objectives. The Korean business plan is then rolled up into a larger plan for Asia, which is, in turn, incorporated into the Divisional plan.

97. In the business plan the Country Manager also prepares a budget for the planned activities.

98. Typically the Country Manager, Korea budget is approximately $60,000 annually. Once approved, the Country Manager has independent control over how it is expended and she is not restricted to expending these funds within the categories set out in her original budget submission.

99. Much of the budget is allocated towards marketing in the particular country and marketing efforts are the sole responsibility of the Country Manager. The Country Manager, Korea briefs the Manager, International Marketing who develops advertisements that are appropriate for the South Korean market. The Country Manager approves the advertisement and places them through agents or directly in industry magazines. She also decides which College programs to highlight, basing her decision on her knowledge of the market.

100. The Country Managers are also responsible for preparing a Country Strategy, which is updated semi-annually. This strategy outlines the manner in which the pillars of the international strategy apply to their particular market and the steps they propose to take to pursue various pillars.

101. The Country Managers also include information relating to enrolment and potential academic programs that are attractive to international students. The Country Strategies are generally approved without change by the Dean.

102. Both the Country Strategies and the Business Plans are heavily informed by the information the Country Managers obtain at the various meetings set out above.

Recruitment and Retention

103. The role of recruitment and retention efforts by the Country Manager, Korea has changed since the creation of the position in keeping with the development of the College's international strategy.

104. By 2008, South Korea was a "mature market" from a recruitment perspective for the College, meaning that the necessary infrastructure to ensure consistent student applications and enrolment on an annual basis was established and the College was routinely achieving its annual recruitment targets for that country.

105. International students currently account for approximately 14-15% of the student body at the College and there has been a steady increase in that percentage since 2005. Recruitment targets are set for particular markets and while the Dean is ultimately responsible for those targets, it is her practice to discuss and reach a consensus on the targets with the Country Managers for the markets for which they are responsible.

106. As the Country Manager, Ms. Lee developed and implemented the international recruitment plan for South Korea by attending recruitment fairs in that country, conducting information sessions for students at local language schools with whom the College had developed partnerships to ensure the students are familiar with the College program options.

107. In respect of the local language school partnerships, the position is required to work with the Director of International and the Chair of the ESL School to assess

the local language school and its facilities to determine if it is appropriate.

108. The recruitment duties continue presently in the role as Country Manager, although the position is now assisted by in-country resources to execute agent and recruitment fair support.

Agent Responsibilities

109. In carrying out her duties related to recruitment and retention, the Country Manager is responsible for managing a network of agents in Korea and in Canada who assist in recruiting South Korean students for the College. These agents are responsible for approximately 80% of the successful student recruitment in Korea.

110. The agents are paid by commission and are maintained on a contract basis with the College which is managed entirely by the Country Manager, including the terms of hire, commission rates and termination. In addition, the Country Manager is responsible for the on-going training, performance management and relationship management of the agents during the terms of their contracts.

111. It is the Country Manager's responsibility to supervise their work to ensure they are branding the College correctly and are up to date on program offerings.

112. In 2006 there were approximately one hundred fifty (150) agents on contract with the College in Korea. Currently, the number is approximately one hundred twenty (120) agents in Korea, a change which reflects a decision by the Country Manager to actively rationalize the number of contracted agents representing the College in the country. There was further streamlining of agents in 2013 and, as a result, the College currently has approximately 80 active agents in Korea.

113. The values of commission payments to agents in Korea annually is approximately $300,000.00, which is managed solely by the Country Manager.

Allocation of Duties

> 114. The Country Manager, Korea generally spends six to nine weeks overseas in her role. The balance of her time is spent in Toronto, with approximately 80% of that time is spent at the College and approximately 20% at language schools or in meetings with local agents. Of the time spent at the College, approximately 20% would involve group meetings, including Divisional and departmental meetings and an additional 20% would involve meetings directly with other Managers, International Recruitment.
>
> 115. The Country Manager position continues to evolve. In particular, contract and part-time employees now report to the Country Manager in certain countries. While the Korea market does not yet require such support, those responsibilities remain within the role and may be required in the near future. These and other evolving responsibilities are reflected in the new Country Manager job description to properly reflect the work being done by individuals in the role.

11. It should be noted that the foregoing is being provided only to assist the parties and to provide them with a starting point when meeting with the LRO. I note that, based on the parties' submissions, a key dispute between the parties relates to the extent to which Ms. Lee's duties involve actual decision-making as opposed to recommendations. This may be an example of an area in which certain aspects of the above facts may have to be reworded in order to finalize an agreement between the parties and/or some *viva voce* evidence may have to be called. While it is expected that the parties may have to make adjustments to the above facts in order to arrive at a final agreed statement of facts, it is anticipated that the end result will significantly shorten the hearing in this matter. After going through this process, the parties are to identify to the Board in writing the limited areas in which they believe *viva voce* evidence is required. The parties are to file this correspondence along with their finalized agreed statement of facts at least ten days before the April 27, 2015 hearing date.

12. The January 22, 2015 hearing is hereby cancelled and replaced with an LRO meeting to commence at 9:30 a.m. that day.

13. I am seized.

0082-13-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v **Heritage Restoration Inc.**, Responding Party, v Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, Intervenor

Certification – Construction Industry – The OPDC sought to carve out an ICI sector bargaining unit of construction labourers from an existing ICI sector bargaining unit of masonry restoration employees represented by Local 598 – The matter turned on where there exists an overlap between the two relevant ministerial designations at issue – The OPDC asserted that the Board's previous decisions (*Clifford Restoration* and *S.S.T. Contracting*) were distinguishable because in both the applicant attempted to displace the entire bargaining unit of masonry restoration employees, whereas here they are only attempting to carve out their own designated trade (ICI sector construction labourers) from the broader unit – The Board notes that since 1978 a single trade, province wide bargaining scheme has been in place in the ICI sector and that this scheme was intended to reflect recognized traditional patterns of collective bargaining and trade union representation which had evolved over the years – This bargaining structure, which provides building trade unions with representational control of the trades or crafts that they have historically represented in the ICI sector, also limits the ability of any particular building trade union to represent workers in the ICI sector to those crafts or trades that it historically represented – With these purposes in mind, the Board continued that it was appropriate to strictly construe the ministerial designations in order to limit overlaps between them, that *Clifford* and *S.S.T. Contracting* had already found there was no overlap in the designations; that the Board agreed with these interpretations and that it did not make practical, labour relations sense to interpret the two designations as overlapping if a reasonable interpretation of those designations exists that is consistent with the underlying purposes of the Act – Accordingly the Board rejected the position asserted by the OPDC, since if there is no overlap it cannot matter whether the OPDC attempts to displace the whole or only certain masonry restoration employees – Finally, the Board listed other reasons that supported its conclusion: a carve out could potentially sweep in other individuals not represented by Local 598, none of whom could cast a ballot, which would be inconsistent with one of the stated purposes of the Act; the position was premised upon a flawed characterization of the group carrying out the work tasks – what occurs is that the work tasks overlap, not the designations; and to accept OPDC's position would undermine the designation provided to Local 598 by the Minister, which would be inconsistent with the purposes of the Act – Application Dismissed

BEFORE: *Lee Shouldice*, Vice-Chair

APPEARANCES: *L.A. Richmond, B. Katz* and *D. Melo* for the applicant; *Andrew Reynolds* and *Bruce Huntley* for the responding party; *Mike McCreary* and *Tony Mollica* for the intervenor

DECISION OF THE BOARD: February 6, 2015

I. Introduction

1. This is a displacement application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

2. The intervenor, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 ("Local 598"), represents a bargaining unit consisting of masonry restoration employees employed by Heritage Restoration Inc. ("Heritage") who perform work in the industrial, commercial and institutional ("ICI") sector of the construction industry. By way of this application the Labourers' International Union of North America, Ontario Provincial District Council ("the OPDC") seeks to secure bargaining rights to represent the following unit of employees employed by Heritage:

> all construction labourers, including masons' or bricklayers' tenders, plasterers and plasters' apprentices and all employees engaged in cement finishing, waterproofing or restoration work in the employ of Heritage Restoration Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

Simply put, the OPDC seeks to carve out an ICI sector bargaining unit of construction labourers from an existing ICI sector bargaining unit of masonry restoration employees represented by Local 598.

II. The Issue

3. Both Heritage and Local 598 resist the application. They state that the OPDC is not designated to represent any of the employees covered by the ICI sector collective agreement binding Heritage and Local 598, and that as a result the OPDC cannot displace Local 598 as bargaining agent for any of those employees.

4. The parties agree that this application can only proceed if there exists an overlap between the two relevant ministerial designations. The OPDC asserts that such an overlap exists. Heritage and Local 598 disagree.

5. There are two ministerial designations that are relevant for the purposes of this proceeding. The relevant ministerial designation for Local 598 was issued by the Minister of Labour on April 27, 1978. It designates the Operative Plasterers and Cement Masons International Association of the United States and Canada and the Operative

Plasterers and Cement Masons International Association of the United States and Canada Local 172 (since merged into Local 598) as the employee bargaining agency to represent in bargaining all masonry restoration employees in the ICI sector of the construction industry in the Province of Ontario.

6. The relevant ministerial designation for the OPDC was first issued by the Minister of Labour on April 21, 1978, and was last amended by the Minister on September 30, 1983. It designates the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council as the employee bargaining agency to represent in bargaining all construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work in the ICI sector of the construction industry.

7. I observe here that this proceeding does not involve the Local 598 cement mason designation, issued by the Minister of Labour on December 9, 2003. There is no dispute amongst the parties that there exists an overlap between that designation and the designation issued to the OPDC referred to above with respect to employees engaged in cement finishing. The issue in this proceeding is whether the separate Local 598 masonry restoration employees designation overlaps the OPDC designation.

III. Relevant Board Jurisprudence

8. Whether there exists an overlap between the two relevant designations at issue in this proceeding has been addressed by the Board previously.

9. In *Clifford Restoration Ltd.*, [1999] OLRB Rep. January/February 4, Labourers' International Union of North America, Local 506 ("Local 506") applied to represent a bargaining unit of all masonry restoration employees employed by Clifford Restoration in the ICI sector of the construction industry, and in all other sectors of the construction industry in Board Area No. 8. That is, Local 506 sought certificates from the Board to represent an ICI sector bargaining unit of employees of Clifford Restoration for which Local 598 was the designated bargaining agent. Local 506 asserted that its designation and the designation enjoyed by Local 598 overlapped, and that it was just as entitled to represent masonry restoration employees as was Local 598.

10. The Board disagreed. At paragraph 24 of its decision, the Board stated as follows with respect to the assertion made by Local 506:

> 24. That position could not be sustained in a purposive approach to the designations and province-wide bargaining. The Labourers' position assumes an overlap between the Labourers' general designation and the Cement Masons' steeplejack designation. Overlaps between designations are not to be assumed. On the contrary, designation orders are to be strictly

> construed in order to reduce the number and extent of overlaps (see paragraphs 12-14 above). Further, as the Board observed more than seventeen years ago in *Ninco Construction, supra*, cement finishing, waterproofing and restoration work, so phrased, are not recognized as separate trades (although they may, with respect, be classifications). Rather, they are kinds of work performed by construction employees, which work is not necessarily monopolized by one trade. In this case, masonry restoration work in the general sense is work which may be done by construction labourers or steeplejacks, both of which *are* recognized trades. This may be a source of a jurisdictional dispute (something which the Board takes no notice of in an application for certification), but it does not suggest that the Labourers Union has any representational claim to ICI steeplejacks. The fact that steeplejacks are a subset of the larger category of employees engaged in masonry restoration and waterproofing work did not assist them in this application. The fact that it was considered appropriate to make a separate designation order specifically for ICI steeplejacks, in the context of an overall structure which is based on representational separation, suggests that the intention was to remove steeplejacks from the more general category of employees broadly classified as construction labourers, or at least employees who were sufficiently like construction labourers that it was appropriate to include them in the labourers' designation order. That is, the Cement Masons' specific claim to steeplejacks trumps the Labourers' claim which is based upon their inclusion in a general category of employees.

The Board also considered it useful to consider the composition of both the employer and employee bargaining agency designations when making its determination:

> 25. It was also useful to compare with the Labourers' general employer bargaining agency designation with the Cement Masons' steeplejacks employer bargaining agency designation. The steeplejacks employer bargaining agency is the Steeplejack and Masonry Restoration Contractors Association. That employers' organization is not part of the general construction labourers employer bargaining agency. If the intention had been to include steeplejacks in the construction Labourers' general designation, one would have expected that the organization which represents the employers who employ them to be included in the employers' designation. It is not, although the Ontario Masonry Contractors Association of Ontario, and the Waterproofing Contractors Association of Ontario, both are. This suggests an

> employment separation between steeplejacks and other masonry restoration or waterproofing employees. This is not to suggest that there must necessarily be (indeed there is not) an overlap between employer designations whenever there is an overlap between employer bargaining agency designations, particularly when it is well known that there are competing employer organizations which have evolved lockstep with one of the two or more trade unions which have historically represented the employees (plasterers, for example) in question. However, the comparison in this case suggests a separation rather than a competition between rival employer organizations.

The Board concluded that the construction labourers designation relied upon by Local 506 to support its application (the same designation relied upon by the OPDC in the instant proceeding) did not cover masonry restoration employees, and the application was dismissed.

11. Two years later the Board was asked by the OPDC to revisit this issue. In *S.S.T. Contracting Ltd.*, 2001 CanLII 3147 (ON LRB), the OPDC applied to displace an ICI sector bargaining unit of masonry restoration employees represented by Local 598 by way of certification. The Board identified as an issue whether the OPDC was precluded from bringing the application as a result of its designation order, and heard argument on that issue. During the course of argument, the OPDC once again asserted that the two relevant designation orders (the same two designation orders considered in *Clifford Restoration*, cited above, and at issue in this proceeding) overlapped.

12. The Board once again disagreed. The Board observed in its decision that this same issue had been dealt with in *Clifford Restoration.* It noted that the OPDC was seeking to displace a bargaining unit consisting of a specifically designated group of employees that the Board had previously determined could not be represented by an affiliated bargaining agent of the OPDC. The panel of the Board in *S.S.T. Contracting* adopted the reasons and analysis of the Board in *Clifford Restoration*, and dismissed the application.

13. The OPDC asserts that the Board's decisions in *Clifford Restoration* and *S.S.T. Contracting* are distinguishable from the instant proceeding, because in both of those applications the applicant attempted to displace the entire bargaining unit of masonry restoration employees represented by Local 598, which it acknowledges it cannot do, having regard to the ministerial designations. Here, however, the OPDC states that it desires to carve out its own designated trade, ICI sector construction labourers, from the broader ICI sector bargaining unit of masonry restoration employees of Heritage represented by Local 598. This, it asserts, it can do.

14. In support of its position, the OPDC relies upon certain comments and observations made by the Board in a number of recent decisions: *Limen Group Ltd.*,

[2013] OLRB Rep. May/June 634; *Phoenix Restoration Inc.*, 2013 CanLII 26030 (ON LRB); and the reconsideration decision of the latter award, *Phoenix Restoration Inc.*, 2013 CanLII 76800 (ON LRB). Heritage and Local 598 do not agree with the OPDC that these decisions alter the previous determinations made by the Board that there is no overlap between the two relevant designations. In addition, both Heritage and Local 598 rely upon comments made in two recent decisions of the Board: *High Point Environmental Services Inc.,* 2013 CanLII 14666; and the reconsideration decision of that award, *High Point Environmental Services Inc.*, 2014 CanLII 9809. The OPDC also relies upon certain comments made by the Board in the reconsideration decision. I consider these five Board decisions below.

15. In *Limen Group* the Board confirmed in the opening paragraph of its decision that, since *Clifford Restoration* the Board has determined that, at least in the ICI sector of the construction industry, an application for certification by a designated craft union (such as the OPDC) for masonry restoration employees is not permissible. The Board also cited the *S.S.T. Contracting* decision for that proposition.

16. One issue before the Board in *Limen Group* was the legitimacy of bargaining rights established by way of a voluntary recognition agreement entered into between the employer and Local 598 for masonry restoration employees. Both the employer and Local 598 asserted that the legitimacy of the voluntary recognition agreement could not be challenged because only Local 598 was designated by the Minister to represent masonry restoration employees in the ICI sector of the construction industry. They asserted that members of other trades (such as bricklayers and construction labourers) could not be in that bargaining unit.

17. The Board disagreed with that assertion. The Board stated the following at paragraphs 21 to 24 of its decision:

> 21. First, whatever else provincial designations do or do not do, it is incontrovertible that they do not, in and of themselves, alone, create or confer bargaining rights. To the extent that Local 598 and Limen found it necessary to enter into the Local 598 collective agreement in the first place obviously recognizes this. The fact that Local 598 is the designated employee bargaining agency for masonry restoration employees does not, in and of itself, mean that they (or necessarily only they can) represent all employees engaged in masonry restoration work in the province of Ontario, let alone those of Limen.
>
> 22. Second, "bargaining rights" and "bargaining units" are not synonymous. Although "bargaining rights" are for "bargaining units" the terms are not interchangeable.

23. Third, even if the decision in *Clifford Restoration, supra*, stands for the proposition that the Labourers (or the Bricklayers) are legally incapable of applying for certification for a bargaining unit of masonry restoration employees in the ICI sector, because that is a separate distinct designation different from theirs (originating in a long line of Board jurisprudence starting with *Clarence H. Graham Construction Limited*, [1981] OLRB Rep. September 1195), I do not think that is what the Board is talking about when it refers to the bargaining unit being empty in *Nicholls-Radtke*, *Syntex* or *Intracorp Developments Ltd.* and other cases. It may very well be that **bargaining rights** for masonry restoration employees are vacant, empty or not currently held (and that Local 598 could make an application for certification for its designated craft unit in these circumstances) but that is not the same as saying that there are no employees performing that work or that the **bargaining unit is empty**. In this case, where there is a history of both the Bricklayers and Labourers previously performing the masonry restoration work of Limen (under their respective collective agreements), to the exclusion of Local 598, it cannot reasonably be said that the bargaining unit is empty.

24. That the work or jurisdictional claims of Local 598 and the Labourers and the Bricklayers overlap is beyond dispute. It is true that only Local 598 is designated for masonry restoration employees – but that is at best an undefined term. The Bricklayers are clearly designated for stonemasons. Whatever the exact parameters of masonry restoration or the special skills that it may also call on, it cannot be disputed that it is also, or included in, masonry (or as counsel for MIECO put it in argument, how could it be that it is lawful for stonemasons to put up or erect the masonry but unlawful for them to repair or restore it when it breaks down). The designation of Labourers for construction labourers explicitly includes "masons' or bricklayers' tenders" and "all employees engaged in cement finishing, waterproofing or restoration work". In fact, neither Limen or Local 598 seriously questioned that the designations may overlap – whatever *Clifford Restoration*, in *obiter*, suggests to the contrary. In fact, as even stated in *Clifford Restoration, supra*, at para. 22:

> … it remains the case that steeplejacks are a subset of the larger, more general, group of employees who perform masonry restoration and waterproofing work. That is, all steeplejacks are employees who perform masonry restoration and waterproofing work, but not all employees

> who perform masonry restoration and waterproofing work are steeplejacks.
>
> There is no dispute that prior to the Local 598 agreement, members of the Bricklayers and Labourers were performing the masonry restoration work for Limen under their respective collective agreements. … In these circumstances it simply defies logic, to describe the bargaining unit as empty. (emphasis in original)

The OPDC asserts that this passage establishes that the two designations at issue in this proceeding do overlap, and that *Clifford Restoration* and *S.S.T. Contracting* do not definitively determine otherwise.

18. In *Phoenix Restoration Inc.*, 2013 CanLII 26030, Local 598 applied to the Board pursuant to section 128.1 of the Act to represent a bargaining unit of all masonry restoration employees in the employ of Phoenix Restoration. The Brick and Allied Craft Union of Canada ("BACU") and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers ("IUBAC") intervened, asserting that they already held bargaining rights for the unit of employees sought by Local 598. In this respect, both BACU and the IUBAC asserted that masonry restoration work is covered by the Bricklayers provincial agreements and that bricklayers and stonemasons are a subset of all masonry employees. Local 598 and the employer, on the other hand, asserted that Local 598 can hold bargaining rights for masonry restoration employees contemporaneously with bargaining rights held by BACU and the IUBAC, and that any conflict that may arise would simply be a work jurisdiction issue that may be dealt with pursuant to section 99 of the Act.

19. The Board accepted the position asserted by the BACU and the IUBAC. The Board observed that Local 598 did not seek to represent a bargaining unit described in terms of a specific craft or trade (like its other standard craft unit of cement masons), but rather was seeking a bargaining unit composed of all masonry restoration employees. The Board stated that the very people that Local 598 sought to represent were individuals covered by, and employed pursuant to, the BACU and IUBAC collective agreements.

20. The following passage of the Board in *Phoenix Restoration* is relied upon by the OPDC in support of its position:

> 24. On any plain reading of the language of the bargaining unit sought (which is identical to the designation in this case) this means that the Cement Masons, in seeking this bargaining unit, will be taking in those bricklayers and masons doing masonry restoration work already represented by the Bricklayers – clearly a subset of "all masonry restoration employees". In fact, there is

no dispute that the BACU certificate for bricklayers in 2004 was based on a masonry restoration project at that time. This is not a situation where the craft bargaining unit is empty and another craft trade union with bargaining rights for its craft bargaining unit with overlapping jurisdictional claims seeks to defeat the attempts to acquire representational rights for the empty craft bargaining unit (like *Semple-Gooder* and the other cases) – rather the bargaining unit of all masonry restoration employees is partially occupied, at least insofar as bricklayers and stonemasons are concerned, and the only way those bargaining rights can be displaced is through a representation vote. Otherwise, the invocation of the mantra of jurisdictional claims not precluding representational rights works to actually defeat the representational rights of the actual employees in question – the actual employees performing this work. … Rather, the very people described in the sought-after bargaining unit (all masonry restoration employees) and performing that work are the very same people already represented in an existing craft unit (bricklayers and stonemasons) whose bargaining rights are held by another trade union. In my view, it is simply too glib to dismiss this situation as merely overlapping jurisdictional claims.

25. The Cement Masons and Phoenix argue that this cannot be a displacement application because regardless of the success of the Cement Masons, at the end of the day the Bricklayers will still retain their bargaining rights for bricklayers and stonemasons. But it is the essentially illusory nature of this argument that reveals its fatal flaw and inapplicability to the facts. Phoenix is primarily, if not exclusively, a masonry restoration contractor. At minimum, BACU's bargaining rights were indisputably acquired on a masonry restoration job. The only people in this all masonry restoration employees bargaining unit actually at work on the date of application were the bricklayers and stonemasons (already working under the Bricklayers agreement). There are no other bricklayers and stonemasons. The only bricklayers and stonemasons at work will be swept into the Cement Masons' all masonry restoration employee bargaining unit if the Cement Masons are successful. It is not that the Cement Masons are prohibited from doing this – but they wish to do so without a representation vote. To pretend that bargaining rights for bricklayers and stonemasons are not effectively being transferred here from the Bricklayers to the Cement Masons (again, something not impermissible, but after a representation vote) because of the notion that the Bricklayers will be left with hypothetical but essentially empty bricklayers and stonemasons

bargaining rights … is simply too abstract a notion for me to accept in these circumstances.

26. I also do not think that reaching this conclusion is necessarily in conflict with the Board's decision in *Clifford Restoration Ltd.*, [1999] OLRB Rep. January/February 4 or the cases that follow it (*S.S.T. Contracting Ltd.*, [2001] OLRD No. 4495). Since masonry restoration employees are the subject of a separate designation, at least in the ICI sector, the Board, in *Clifford Restoration*, did not permit the Labourers union to displace the Cement Masons entirely and represent a bargaining unit of all masonry restoration employees. That is because steeplejacks (how an all masonry restoration employees unit is sometimes referred) were beyond and not included in the Labourers designation in the Board's view in *Clifford Restoration*:

> 22. … "Employees engaged in restoration and waterproofing work" and "steeplejacks" are not equivalent terms. Strictly speaking, a steeplejack is someone who is engaged in building or repairing towers, smokestacks or steeples. As a practical matter, the term is applied somewhat more liberally in the construction industry in Ontario, but it remains the case that steeplejacks are a subset of the larger, more general, group of employees who perform masonry restoration and waterproofing work. That is, all steeplejacks are employees who perform masonry restoration and waterproofing work, but not all employees who perform masonry restoration and waterproofing work are steeplejacks.

I make no comment on what the status of the trade of steeplejacks is today. However, I do not read *Clifford* as saying (nor do I think it should be taken to say) that the Labourers are unable to carve out from an all masonry restoration employees bargaining unit merely a construction labourers bargaining unit – which is what the Labourers are designated for, and their "craft". That appears to be neither argued nor considered in *Clifford*.

27. In essence, that is akin to what I think is happening here. The Cement Masons are seeking to acquire a bargaining unit of all masonry restoration employees, as they are entitled to do – that is what they hold a designation for. There is no doubt that part of an all masonry restoration employees bargaining unit includes bricklayers and stonemasons. … Here, part of that all masonry restoration employees bargaining unit – the bricklayers and

> stonemasons – is already represented by the Bricklayers. In fact, in the circumstances of these applications they are the only employees in the bargaining unit – but there is no doubt that the all masonry restoration bargaining unit is wider than that. …
>
> 28. In these circumstances, before the Cement Masons can acquire these bargaining rights, to the extent they are already held for bricklayers and stonemasons, there must be a representation vote.

21. Phoenix Restoration requested reconsideration of the initial decision. Its request was supported by Local 598. In *Phoenix Restoration Inc.*, 2013 CanLII 76800, the Board denied that request. In its reasons for denying the request for reconsideration, the Board stated the following, at paragraph 7:

> 1) At the outset, it should be remembered that what the Decision is really about is whether votes cast at a representation vote should be counted – in other words, whether the Cement Masons' application for certification should be treated as a displacement application of existing (or part of existing) bargaining rights.
>
> …
>
> 4) In any event, the fact that Phoenix now asserts that it wishes to continue, at least in some part, to assign some masonry restoration work to the Bricklayers pursuant to the still-binding Bricklayers collective agreement (even assuming a successful certification application by the Cement Masons) arguably only reinforces the Board's conclusion that the existing Bricklayers' bargaining rights do cover masonry restoration work – in other words, that this certification application amounts to (at least in part) a displacement application for those bargaining rights which should be tested by a representation vote.
>
> 5) The fact that "every single provincial bargaining designation order" contains the word "all" in referring to all journeymen and apprentices, for example pipefitters, as Phoenix points out, is of absolutely no assistance to it. Those are contained in specific craft designations. Cement Masons, at least for masonry restoration work, do not enjoy such a designation. Masonry restoration work is not a designation of a craft – it is a designation of a certain kind of work which other crafts (bricklayers and labourers for example), other than the cement masons, also perform. That is why the designation is described as "all masonry

> restoration employees". It is for this reason, *inter alia*, that the Board can conclude that bricklayers and stonemasons are a subset of all masonry restoration employees – a conclusion not novel in the Decision but expressed in other decisions (see for example *Limen Group Ltd.*, CanLII 35130 (ON LRB) (June 11, 2013) at paragraph 24, or *Clifford Restoration Ltd.*, [1999] OLRB Rep. Jan./Feb. 4 at para. 22 – referred to in *Limen*). In fact, all parties, including Phoenix, relied on and referred me to *Limen*, albeit for different purposes, in their arguments.
>
> 6) … Again, what the Decision decides is whether the Cement Masons can acquire bargaining rights for masonry restoration employees without the counting of the ballots of the current masonry restoration employees who were properly engaged pursuant to the Bricklayers collective agreements. In my view, in the unique circumstances of this case, and "all masonry restoration employees designation" and bargaining unit, that is a displacement certification application that requires a representation vote.

22. Finally, as noted earlier, I was directed to *High Point Environmental Services*, cited above, and its decision on reconsideration, reported at 2014 CanLII 9809. That proceeding was a displacement certification application brought by the OPDC for a bargaining unit consisting of all construction labourers in the employ of High Point Environmental Services in the ICI sector of the construction industry, with the usual managerial exceptions and a clarity note to the effect that the bargaining unit consists of all employees engaged in asbestos abatement.

23. The Ontario Council of the International Union of Painters and Allied Trades and its Local 1891 ("the Painters") intervened. The Painters asserted that they held the bargaining rights for the individuals in question. As in the instant proceeding, the OPDC asserted that it desired to carve out from the Painters ICI bargaining unit those employees engaged in the work of asbestos abatement, which it asserted was construction labourers' work covered by both its designation and by the Painters' designation. In the ICI sector of the construction industry, the work was performed by companies bound to the OPDC pursuant to its ICI sector demolition agreement. High Point Environmental was already bound to the latter collective agreement.

24. In the circumstances, both High Point Environmental and the Painters asserted that the application ought to be dismissed. The Board agreed, stating as follows at paragraphs 29 to 31:

> 29. I agree with the Board's decision in *Clifford Restoration* that designation orders are to be strictly construed in order to reduce the number and extent of overlaps. Asbestos abatement or

> asbestos removal work is a kind of work performed by construction employees, but it is not a distinct trade, and it has not necessarily been monopolized by one trade, as the Board noted in the *Metropolitan Toronto Demolition Contractors' Association* decision. This may be the source of a jurisdictional dispute, but it does not mean that the Labourers have any representational claim to asbestos abatement in the ICI sector. As the Board has stated in its jurisprudence, a certification application is not the place to argue jurisdictional disputes, as the Board has a separate regime pursuant to the Act (section 99) to address such disputes when they arise.
>
> 30. In this instance High Point had recognized the Painters for their Ministerially-designated ICI bargaining unit, which at this company included persons who do asbestos abatement. That work was performed by those covered by the Painters' Provincial ICI collective agreement. As outlined above, the Painters' collective agreement includes a variety of types of "painters" workers, including specifically asbestos removers. In a displacement application the applicant would generally be obliged to take the whole bargaining unit as it finds it in the incumbent union's collective agreement. As such, the Labourers should have applied to displace the Painters in the whole Painters' ICI bargaining unit.
>
> 31. However, the Labourers were undoubtedly aware that they could not seek to displace the Painters in that unions' designated ICI bargaining unit, and so instead are seeking to have the Board grant a bargaining unit description that on its face appears to be consistent with the Labourers' own designated general ICI bargaining unit, but which in fact, by the addition of the clarity note, would represent an amendment to the Labourers' designation. This the Board will not do.

The Board concluded that the unit of employees sought by the OPDC could not be appropriate for bargaining, and dismissed the certification application.

25. A request for reconsideration made to the Board by the OPDC was also dismissed, after a hearing was convened to hear submissions from the parties. During oral argument the OPDC relied upon the initial decision of the Board in *Phoenix Restoration* in support of its request.

26. In the course of its reasons, the Board made the following observations at paragraphs 31 to 33 of its decision:

31. The Labourers rely upon *Phoenix* for the proposition that they are entitled to apply for employees performing a type of work that falls within their designated bargaining unit. They are, they argue, entitled to "carve out" this work from the Painters' designated bargaining unit. Put differently, the Labourers argue that this is not just a case of overlapping work jurisdiction, but a case of overlapping bargaining units.

32. The issue in *Phoenix* is entirely distinguishable from the one in the case at hand. In that case, the Bricklayers had existing bargaining rights in relation to a particular employer. The Cement Masons did not have existing rights with respect to their designated bargaining unit for employer [sic]. The Cement Masons filed a card-based application for certification. Given that there was an overlap between the Bricklayers' bargaining units and the Cement Masons' designated bargaining unit, the Bricklayers argued that the application was in fact a displacement application requiring a representation vote. The Board agreed with the Bricklayers, noting; "The very people that are performing the work and that Cement Masons seek to represent are the people covered pursuant to the Bricklayers collective agreements". However, as the Board subsequently made clear in a reconsideration decision (see 2013 CanLII 76800 (ON LRB)), the only issue it was determining was that a representation vote should be held in these circumstances: it was not determining the effect of a successful application on the Bricklayers' rights. By contrast, the issue before me is whether this application should proceed. The fact that a representation vote would need to be held if this application were to proceed is no answer to the question of whether the application should proceed in the first place.

33. In any event, I do not agree that *Phoenix* establishes the general proposition that an EBA or ABA is entitled to carve out a "type of work" from the designated bargaining unit of another EBA or ABA. A carve out presupposes an overlap of bargaining units. At minimum *Clifford Restoration Limited* stands for the proposition that overlap between designated bargaining units is to be avoided where possible. The Cement Masons' designated bargaining unit, which is the subject of *Phoenix*, is arguably an exception to this general rule. It contains an express reference to a type of work, "all masonry restoration employees", which arguably may be carved out of the Bricklayers' designated bargaining unit. The need for any such carve out arises, however, from that express language, not by implication.

IV. Analysis

27. Since 1978 a single-trade, province-wide bargaining scheme has been in place in the ICI sector of the construction industry. As noted by the Board in *Clifford Restoration*, the bargaining scheme established by the Act was intended to reflect recognized traditional patterns of collective bargaining and trade union representation which had evolved between construction trade unions and construction employers over the preceding years. The bargaining structure created by the Act effectively provides building trade unions with representational control of the trades or crafts that they have historically represented in the ICI sector of the construction industry. The limitation created by this structure is that the ability of any particular building trade union to represent workers in the ICI sector is confined to those crafts or trades that it historically represented.

28. A critical feature of the ICI sector collective bargaining structure is the ministerial designation orders established by section 153 of the Act. In order to carry out collective agreement negotiations in the ICI sector, section 153(1) of the Act permits the Minister of Labour to establish employee bargaining agencies and employer bargaining agencies for various trades by way of designation. Those orders identify the trade union or trade unions that constitute the employee bargaining agency for particular trades with respect to ICI sector construction, and the employer association or associations that constitute the employer bargaining agency designated to bargain with its trade union counterpart. As noted by the Board in *Clifford Restoration*, the purpose and intent of the designations within the provincial ICI sector scheme of bargaining is to maintain a separation between the various construction trades and the unions which represent them in the ICI sector of the construction industry.

29. With the above purpose in mind, the Board has held that it is appropriate to strictly construe the ministerial designations in order to limit overlaps between them, as much as possible (see *Clifford Restoration* at paragraph 12; the initial decision in *High Point Environmental Services*, at paragraph 29; and the reconsideration decision in *High Point Environmental Services*, at paragraph 33). In both *Clifford Restoration* and *S.S.T. Contracting* the Board considered the scope of the two designation orders relevant to this proceeding, interpreted them in a purposive manner, and concluded that they did not overlap. In effect, the Board interpreted the ministerial designation of Local 598 as the exclusive bargaining agent for ICI sector masonry restoration employees as having established a self-contained carve out of those employees from the broader, more general category of restoration employees for whom the OPDC has been designated by the Minister to represent.

30. I agree with the interpretation given to the two relevant designation orders by the Board in both *Clifford Restoration* and *S.S.T. Contracting*, and adopt the reasoning set out in those two decisions. Given the purpose that underlies the system of province-wide bargaining in the ICI sector of the construction industry, and the role played by

ministerial designations in that system, the only interpretation that can be given to the two relevant designations consistent with that purpose and role is one that concludes that the Local 598 designation is itself a carve out of a separate and distinct group of workers from a larger group of restoration workers. It does not make any practical, labour relations sense to interpret the two designations as overlapping if a reasonable interpretation of those designations exists that is consistent with the underlying purpose of the Act.

31. Once that proposition is established, the position asserted by the OPDC in this proceeding must be rejected. If, by definition, the ICI sector masonry restoration employees for whom Local 598 has been designated by the Minister as exclusive bargaining agent constitute a separate and distinct group of workers from the remaining restoration employees for whom the OPDC has been designated exclusive bargaining agent, then whether the OPDC seeks to displace all masonry restoration employees employed by an employer (as Local 506 did in *Clifford Restoration* and as the OPDC itself did in *S.S.T. Contracting*) or only certain masonry restoration employees employed by an employer (as the OPDC does in this proceeding), there can exist no overlap between those two designations.

32. There are other reasons that support the conclusion reached above. During the course of argument counsel for Heritage noted that consequences inconsistent with the underlying purposes of the Act could arise should the position proposed by the OPDC be adopted by the Board.

33. Section 2 of the Act identifies as one purpose of the Act the desire to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees. Counsel for Heritage observed that an application for certification to carve out ICI sector construction labourers from a larger Local 598 bargaining unit of ICI sector masonry restoration employees must be effected by way of a displacement application. Any such application is determined by way of a representation vote, in which only those affected employees who were at work in the incumbent's bargaining unit that is subject to potential displacement are entitled to cast a ballot vote. However, if the OPDC were to be successful in winning such a representation vote of affected individuals in the Local 598 bargaining unit, the OPDC would become not only the bargaining agent for those individuals, but also for any other ICI sector construction labourers employed by the employer in the province of Ontario.

34. Put simply, a successful application by the OPDC to carve out a group of ICI sector construction labourers employed by an employer within a Local 598 bargaining unit could potentially have the result of sweeping many other individuals not represented by Local 598 into the bargaining unit, none of whom would be entitled to cast a ballot. Although the ICI sector provisions of the Act are hardly democratic (see *In the Matter of a Reference from the Minister of Labour*, 2012 CanLII 66861, at paragraphs 51 and 52), such a result would be clearly inconsistent with one of the stated purposes of the Act.

35. In my view, the position asserted by the OPDC is premised upon a flawed characterization of the group carrying out the work tasks performed by masonry restoration employees who are employed by Heritage in the Local 598 bargaining unit. Some (or perhaps all) of those employees perform a number of work tasks in the ICI sector of the construction industry that are also performed by construction labourers in that same sector of the construction industry. That is, the work tasks performed by a "masonry restoration employee" and a "construction labourer" performing restoration work in the ICI sector of the construction industry will often be similar, if not identical. In these circumstances the OPDC points to its designation order, notes that the work tasks performed by the individuals in question are those performed by construction labourers in the ICI sector, and asserts that it simply desires to secure representation rights for construction labourers employed by Heritage who perform work for that entity in the ICI sector.

36. The difficulty with the position asserted by the OPDC is that the affected individuals are not properly characterized as ICI sector construction labourers for the purposes of the Act, notwithstanding that they perform some (or perhaps all) of the same tasks that construction labourers perform on ICI sector construction sites. For the purposes of the Act, those individuals are not construction labourers employed by Heritage but are, instead, masonry restoration employees employed by Heritage. As such, they fall outside the scope of an ICI sector bargaining unit of construction labourers that the OPDC is designated by the Minister to represent. The work tasks overlap, but the designations do not.

37. This distinction has been articulated by the Board on numerous occasions, with respect to different trades. Recently, in *PCL Constructors Canada Inc.*, [2014] OLRB Rep. January/February 83, a work assignment dispute, Local 27 of the United Brotherhood of Carpenters and Joiners of America asserted that the employer could not lawfully apply the Labourers' Provincial ICI collective agreement to the work being performed because it was work that carpenters invariably perform in connection with concrete forming construction in the ICI sector of the construction industry. Local 27 argued that to permit the work to be performed pursuant to the Labourers' ICI agreement would undermine the province-wide bargaining structure established by the Act in the ICI sector.

38. The Board disagreed. At paragraphs 50 and 51 of its reasons, the Board stated the following:

> 50. There is, however, a critical difference between representation rights and work jurisdiction. While Local 27 cannot obtain bargaining rights through certification to represent construction labourers in the industrial, commercial and institutional sector and Local 183 cannot obtain bargaining rights through certification to represent carpenters in the industrial, commercial and institutional sector, members of Local 27 can and

> do perform work in the industrial, commercial and institutional sector that is also done by construction labourers and construction labourers can and do perform work in the industrial, commercial and institutional sector that is also done by carpenters.
>
> 51. Local 27 in its submissions has, in my view, equated representation rights with work jurisdiction in order to advance its arguments. They are different. ...

The Board concluded that the employees who were performing the work in dispute were construction labourers who were engaged in work that is also done by carpenters, and that there was no violation of the Act in the circumstances.

39. The analysis made by the Board in *PCL Constructors Canada* applies equally to the instant proceeding. The masonry restoration employees of Heritage can and do perform work in the ICI sector that is also performed by construction labourers. That does not make the masonry restoration employees of Heritage construction labourers for the purposes of the Act. They are not.

40. It was argued by the OPDC that the bargaining unit of employees sought in this application was appropriate because the individuals for whom Local 598 is identified by ministerial designation as the exclusive bargaining agent in ICI sector construction are not defined by reference to any specific construction trade or craft, but are instead defined by reference to the term "all masonry restoration employees". It was asserted that the use of this term to define those falling within the Local 598 bargaining unit allows a trade union such as the OPDC to apply to the Board to carve out a narrower bargaining unit of ICI construction labourers, the ICI sector bargaining unit for which it has been designated by the Minister.

41. I have considerable difficulty with that proposition. To adopt such an approach ignores the determination made by the Board in *Clifford Restoration* and *S.S.T. Contracting* (with which I agree) that there is simply no overlap between the two relevant designation orders. As indicated previously, if there is no overlap of the two designation orders, no application for a more narrowly defined bargaining unit of ICI sector construction labourers (or any other trade) is possible. The proposition is also inconsistent with the analysis articulated by the Board in *PCL Constructors Canada* that is referred to above.

42. In addition, however, to accept that approach would have the effect of undermining the designation provided to Local 598 by the Minister, a result that would be entirely inconsistent with the intent of the province-wide bargaining scheme established by the Act. That statutory scheme was intended to establish stable bargaining structures in the ICI sector of the construction industry by eliminating the ability of one trade union to displace the ICI sector bargaining rights held by another, rival trade union. If the ICI sector collective agreement of a designated employee

bargaining agency properly covers the employees who are the subject of a displacement certification application in relation to the ICI sector, in the absence of an overlap between the relevant designations an affiliated bargaining agent represented by another designated employee bargaining agency cannot seek to carve out those employees from the existing bargaining unit.

43. There is no reason to believe that the Minister specifically intended ICI sector masonry restoration employee bargaining units represented by Local 598 to be open to raids by the OPDC or any other rival trade union. Such a result is not what the province-wide ICI sector provisions of the Act were intended to achieve. Accordingly, I do not accept the proposition that the use by the Minister of the term "masonry restoration employees" in the Local 598 designation allows for an application such as that brought by the OPDC in this proceeding.

44. It is appropriate at this juncture to comment upon certain observations made in recent decisions of the Board that are relied upon by the OPDC.

45. I agree with a number of the observations made by the Board in *Limen Group*. Amongst other things, in that decision the Board noted that the work jurisdiction claims of Local 598 and the OPDC overlap. As noted above, there can be no dispute that that is, in fact, the case – both trades perform many of the same work tasks on ICI sector construction projects. However, for the reasons identified earlier, the overlap of work tasks performed by construction labourers and masonry restoration employees in the ICI sector of the construction industry does *not* mean that there is an overlap in the two relevant ministerial designations. There is no such overlap.

46. I have some difficulties with certain comments made by the Board in *Limen Group* with respect to the two designations in issue in the instant proceeding. It is suggested at paragraph 24 of *Limen Group* that neither the employer in that proceeding nor Local 598 "seriously questioned that the designations may overlap - whatever *Clifford Restoration*, in *obiter*, suggests to the contrary". A passage from paragraph 22 of *Clifford Restoration* is then cited, in which the Board described the Local 598 designation as a subset of a "more general group of employees who perform masonry restoration and waterproofing work".

47. It is evident that the above-referenced comment made by the Board in *Limen Group* was not necessary for the purpose of dealing with the issue that was live before the Board in that proceeding. In any event, it is simply incorrect to assert that the conclusion reached by the Board in *Clifford Restoration*, namely that the two designations in dispute in that proceeding do not overlap, was *obiter*. With respect, the very issue before the Board in *Clifford Restoration* was whether the two designations in question did or did not overlap. The Board specifically concluded that they did not, and the passage from paragraph 22 of the Board's decision in *Clifford Restoration*, as I read it, supports that conclusion.

48. Simply put, at its core the issue before the Board in *Clifford Restoration* (and in *S.S.T. Contracting*) is the same issue that is before the Board in this proceeding. Both *Clifford Restoration* and *S.S.T. Contracting Ltd.* stand for the proposition that the two designations in issue in this proceeding do not overlap.

49. Counsel for the OPDC also relied upon the observation made by the Board at paragraph 26 of its initial decision in *Phoenix Restoration* that the decision in *Clifford Restoration* ought not to be read to have established that the OPDC is unable to carve out from an ICI sector masonry restoration employees bargaining unit a unit of ICI sector construction labourers. The Board noted in *Phoenix Restoration* that that particular issue was neither argued nor considered in *Clifford Restoration.*

50. I agree with the latter observation. In both *Clifford Restoration* and *S.S.T. Contracting* the applicant unions (Local 506 and the OPDC, respectively) applied to the Board to represent the entire bargaining unit represented by Local 598, namely all masonry restoration employees. The Board determined that Local 506 and the OPDC could not do so. The question of whether Local 506 or the OPDC could have applied to the Board to represent a smaller, carved out unit composed only of ICI sector construction labourers was not specifically argued or considered by the Board in those proceedings.

51. That said, I do not agree with the observation that *Clifford Restoration* cannot be interpreted to mean that the OPDC is unable to effect such a carve out. With respect, that is the *only* interpretation that can be given to *Clifford Restoration* when one considers the underlying reasoning of the Board in that decision, and in *S.S.T. Contracting.* At the risk of being unduly repetitive, the Board concluded in both *Clifford Restoration* and *S.S.T. Contracting* that the unit of employees that Local 598 has been exclusively designated by the Minister to represent in bargaining in the ICI sector of the construction industry exists separate and apart from the bargaining unit of ICI sector construction labourers for whom the OPDC has been exclusively designated to represent. There is no overlap between those two units. If there is no overlap when the entire units are considered, it is simply not possible for there to be an overlap when the OPDC unit and a smaller portion of the Local 598 unit are considered.

V. Conclusion

52. For the reasons set out above, I am of the view that there is no overlap between the OPDC designation for ICI sector construction labourers and the Local 598 designation for ICI sector masonry restoration employees. In the absence of an overlap in the designations, the OPDC cannot successfully apply to displace Local 598 as the exclusive bargaining agent of any individual employed by Heritage in its masonry restoration employees bargaining unit.

53. In the circumstances this application is dismissed.

54. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

55. The employer is directed to post copies of this decision immediately, adjacent to the "Notice of Vote and of Meeting" posted previously. These copies must remain posted for a period of 45 business days.

0611-14-G Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on its own behalf and on behalf of Local 93, Applicant v. **Hydro One Networks Inc.**, Responding Party.

Collective Agreement – Construction Industry Grievance – Employee – The grievor was denied a subsistence allowance meant to compensate employees for the cost of securing accommodation when working at a site remote from their "regular residence" – A regular residence is defined as "...a self-contained, domestic establishment (a dwelling house, apartment or similar place of residence where a person generally eats and sleeps... in contrast to a boarding house facility which is not self-contained..." – The grievor lives in a one-room unit on the second floor of a former hotel – The unit is a private space accessed using a key – Inside the unit are all of the normal things associated with domestic life, save for a bathroom and shower, which are instead located adjacent to the unit and shared with the occupants of four other units – The grievor pays rent on a monthly basis, inclusive of utilities – All of the units on the first floor and all but five of the units on the second floor include their own bathrooms and showers – There are no shared kitchen facilities or common areas – The issue before the Board was whether or not the grievor's unit was self-contained – Hydro One asserted a unit is not self-contained unless all the elements of sleeping, eating, and bathroom facilities are included – The Board determined it must consider the facts of each individual case, the applicable contractual language, and the context of the situation – The grievor does not live in a boarding house, which would include the provision of meals and the consuming of those meals in a common area –Viewing the situation in its entirety, and having regard to the purpose of the article, the Board

determined the grievor's unit meets the definition of a "self-contained domestic establishment" – It is a *bona fide*, albeit extremely basic, apartment – It is not mandatory that there must be an ensuite washroom and shower for a unit to be a "self-contained domestic establishment" – It would be manifestly inequitable and contrary to the intent and language of the article to find the unit does not meet the definition, as other units in the same residential building would clearly meet the definition – Hydro One violated the collective agreement – The Board directed Hydro One to compensate the grievor for damages arising from the violation

BEFORE: *Jack J. Slaughter*, Vice-Chair

APPEARANCES: *Melissa Kronick, Jim Congdon*, and *Roger Brooks* appearing for the applicant; *Scott Williams, Paul Willetts, Heather White* and *Tiffany Campbell* appearing for the responding party.

DECISION OF THE BOARD: February 3, 2015

1. This is a referral of grievance to arbitration (construction industry) under section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

2. The Board conducted a hearing in this matter on June 12, November 17, and December 3, 2014.

WHAT THIS CASE IS ABOUT

3. This grievance concerns the right of the applicant's member, Roger Brooks, to claim subsistence allowance under the collective agreement between the Electrical Power Systems Construction Association ("EPSCA") and the Carpenters' District Council, United Brotherhood of Carpenters and Joiners of America ("the Union"). There is no dispute that the collective agreement has been binding upon the Union, Hydro One Networks Inc. ("Hydro One") and Mr. Brooks at all relevant times.

4. The relevant provisions are found within Article D 1.2 of Appendix C of the collective agreement and read as follows:

> ROOM AND BOARD
>
> 1.2 The following conditions will apply for employees whose regular residence* is more than 97 radius kilometers from the work location:

a) An employer may supply either:

(i) room and board in camp or a good standard of board and lodging;
or

(ii) a subsistence allowance;

subject to Sections 1.2 (b) and (c) below.

b) An employee may exercise his option not to stay in a camp or accept room and board. An employee who exercises this option and qualifies for subsistence allowance shall receive a subsistence allowance of $83.43 per [day] effective September 15, 2010 ($85.93 effective May 1, 2011, $88.51 effective May 1, 2012, $91.17 effective May 1, 2013, $93.90 effective May 1, 2014, $96.72 effective May 1, 2015, $98.65 effective May 1, 2016, $100.63 effective May 1, 2017, $102.64 effective May 1, 2018, $104.69 effective May 1, 2019 and $106.78 effective May 1, 2020) for each day worked or reported for subject to Section 1.2 (c) below.

* An employee's 'regular residence' is:

1. The place where the employee maintains a self-contained, domestic establishment (a dwelling house, apartment or similar place of residence where a person generally eats and sleeps and for which he can show proof of financial commitment). This is in contrast to a boarding house facility which is not self-contained; arid

2. The employee normally resides in the residence except for those periods of time when, because of the location of the work, the employee is forced to obtain temporary accommodation at that work location.

...

THE FACTUAL ISSUES

5. There is no dispute that, at all relevant times, Mr. Brooks has resided at Apartment 23, 842 Rue Notre-Dame, Gatineau, Quebec. Hydro One initially took issue with whether Mr. Brooks' residence met the conditions necessary to qualify for the payment of subsistence allowance under the collective agreement provision in a number of different ways. One particular area of dispute was whether there were shared kitchen facilities. The Union opened its case by calling upon Mr. Brooks to testify and address Hydro One's concerns.

6. To this end, Mr. Brooks testified about his living arrangements, including making reference to written documents, cancelled rent cheques, and photographs of the premises. He lives in a one-room apartment located on the second floor of a former hotel. There are 24 units in total. All of the units on the first floor have their own bathrooms and showers as do all but 5 of the units on the second floor. Mr. Brooks lives in Apartment 23, which is a single room with a walkout balcony. To access his unit, he uses a key that allows him to go into the building via an entry door and walk up a set of stairs dedicated to the upstairs units only. A visitor cannot access the upstairs units through the other doors to the building. Furthermore, Mr. Brooks has a key to lock his own unit. The dimensions of Mr. Brooks' unit are 21 feet long and 14 feet wide.

7. Inside the unit, he has a refrigerator, crockpot, one-burner stove, sink, toaster, coffee machine, microwave oven, telephone, desk, flat screen television, table and bed. The unit also contains window coverings and an air-conditioning unit, both of which were installed by Mr. Brooks. However, there is no bathroom or shower inside his unit. He shares a bathroom and shower with the occupants of 4 other units. There is a laundry room on the first floor, but Mr. Brooks has only used it once in his over five years of occupancy of the unit. He pays rent on a monthly basis, which is inclusive of utilities. Mr. Brooks testified that there are no shared kitchen facilities or common areas.

8. After Mr. Brooks completed his evidence, Tiffany Campbell testified on behalf of Hydro One. Ms. Campbell is a Co-ordinator in Hydro One's Workforce Acquisition Department. She was responsible for verifying Mr. Brooks' application for subsistence allowance. Ms. Campbell had some difficulty getting the information she required from Mr. Brooks' landlord, Denis Lariviere, and the building manager, Jean-Yves, as Mr. Lariviere spends a considerable amount of time in Florida, and apparently both Denis and Jean-Yves do not speak English, while Ms. Campbell does not speak French. Furthermore, Mr. Brooks is much more comfortable in French than English. Due to an apparent miscommunication, Ms. Campbell concluded that Mr. Brooks is living in an "old hotel that they turned into a boarding house" and "shares kitchen and bathroom". Accordingly, she denied his claim for subsistence allowance. In doing so, she relied on her view that because the unit did not have a washroom or kitchen it did not meet the "Revenue Canada description of self-contained". She admitted that she had no Hydro One policies in front of her when making this determination and did not look at the Revenue Canada requirements in the course of making her decision.

9. After Ms. Campbell completed her testimony, the parties agreed to have a bilingual Hydro One security person attend at the premises to inspect it and take photographs. The parties felt this would avoid having to attempt to summons the landlord to testify by Skype or to attend by travelling from Quebec or further afield. The bilingual Hydro One security person did attend at the premises and made notes on a Hydro One form. However, Hydro One elected not to call that person as a witness. The Union then wished to enter the security person's notes into evidence, but Hydro One objected, asserting that by not calling the security person they were no longer challenging Mr. Brooks' testimony about the nature of the unit and premises.

10. After taking instructions, counsel for the Union withdrew her request to enter the notes into evidence, but invited the Board to draw an adverse inference against Hydro One for failing to call the Hydro One security person in all the circumstances of this case.

11. The Board is prepared to accede to this request from counsel for the Union. The Board has adopted the rule developed in the civil courts that "the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies an inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure is attributed": *Royal Trust v. Toronto Transportation Commission*, [1935] S.C.R. 671; *Murray v. Saskatoon*, [1952] 2 D.L.R. 499 (Sask. C.A.); *Consolidated Bathurst Packaging Ltd.,* [1983] OLRB Rep. September 1411; *Repla Limited,* [1990] OLRB Rep. December 1319.

12. In this case, the bilingual Hydro One security person was specifically assigned to attend at the premises, and to take photographs and report back on the state of the premises. There is no question that person, after the visit, was in possession of evidence which could elucidate relevant facts on the outstanding issues in this case. Indeed, that was the whole point in arranging the visit. For Hydro One then not to call that person as its witness, can only indicate that the person's evidence would have been unfavourable to Hydro One's case. Accordingly, the Board has no difficulty drawing an adverse inference against Hydro One, and preferring the testimony of Mr. Brooks to that of Ms. Campbell wherever there is any conflict.

13. Therefore, the Board finds Mr. Brooks lives in a second floor apartment unit, which is locked by a key and has its own (albeit limited) cooking facilities and no shared kitchen or meal area, with Mr. Brooks sharing a bathroom and shower with 4 other tenants.

THE LEGAL ISSUE

14. After conclusion of the evidence, Hydro One conceded that there was no issue that Mr. Brooks had met the "financial commitment" and "regularly resides" portions of the entitlement to subsistence allowance. However, Hydro One continues to maintain

that Mr. Brooks' place of residence does not meet the "self-contained" requirement of the collective agreement provision.

15. The Board will briefly summarize the legal arguments of each party.

16. The Union says that the issue here is whether a one room or bachelor apartment without its own bathroom and shower can constitute a self-contained domestic establishment or dwelling house as opposed to a boarding house.

17. In this case, the Union says that the unit in question has cooking facilities, a sink, a sleeping area and an eating area. Mr. Brooks' uncontested evidence is that he regularly eats and sleeps there. The fact that there is no bathroom or shower located within the unit should not prevent the Board from finding that the apartment is in fact a self-contained unit.

18. The Union referred the Board to the Wikipedia definition of "boarding house" and to the following legal decisions: *Hydro One Inc.* 2011 CanLII 35854 (June 17, 2011) (John Lewis); *Hydro One Inc.*, 2012 CanLII 13473 (March 12, 2012) (Hayes); *Uratemp Ventures Limited v. Collins* [2001] UKHL 43.

19. The Union urges the Board to interpret the collective agreement "holistically" and to find that Mr. Brooks resides in a "dwelling house" that qualifies for subsistence allowance under the collective agreement.

20. Hydro One takes a contrary view. In Hydro One's submission, the Board should focus on the "self-contained" aspect of the collective agreement definition. Hydro One says that the collective agreement provision is modeled on a definition from the *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.), s. 225 *("*the *Income Tax Act")* and should be interpreted in a manner consistent with that statute. Hydro One claims that to do otherwise could cause it practical difficulties in administration. Hydro One submitted both provisions of the *Income Tax Act* and Income Interpretation Bulletins for the Board's consideration.

21. Furthermore, Hydro One asserts that a unit is not a self-contained unit unless all the elements of sleeping, eating, and bathroom facilities are included. Hydro One argues that *Hydro One* (Hayes) has decided this argument in its favour. Hydro One says that arbitral jurisprudence requires the Board to follow the reasoning in *Hydro One* (Hayes). On this point, Hydro One cites: *Coca-Cola Bottling Company (Boudreau grievance)* Grievance No. M/Y300431 (Hornung) (May 17, 2006); *Blue Door Shelters* (Monteith) (March 31, 2014); *Bluewater District School Board* (2008), 172 L.A.C. (4th) 144 (Tacon); *City of Toronto* (Davie) (March 4, 1999).

22. In brief reply, the Union says that *Hydro One* (Hayes) is based on completely different facts and is hence distinguishable; and that the Income Tax Interpretation Bulletins are not law, and need not be followed or applied by the Board.

ANALYSIS AND DECISION

23. At the outset, it is important to note that this is an arbitration of a grievance under a collective agreement. This is not a proceeding under the *Income Tax Act* in order to determine the status of the unit occupied by Mr. Brooks under that legislation, or to ascertain whether any subsistence allowance that might be paid to him by Hydro One would be taxable.

24. General principles of contract interpretation apply to collective agreements, including collective agreements in the construction industry. The Board enunciated the applicable principles in *Bruce Power LP*, [2004] OLRB Rep. May/June 479 where it wrote at paragraph 14:

> 14. The Board is thus required to analyze and interpret the language of the collective agreement. A collective agreement is a contract. As described in *Canadian Labour Arbitration Third Edition* (D.J.M.Brown and D.M. Beatty,Aurora: Canada Law Book, 2003) at p. 4-42, an arbitration tribunal's task in interpreting a collective agreement is no different than that faced by other adjudicators in applying statutes, private contracts and other authoritative directives. The general principle for interpreting contracts is that the tribunal should "search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract": *Consolidated-Bathurst Export Ltd.* v. *Mutual Boiler & Machinery Ins. Co.,* (1979), 112 D.L.R. (3d) 49 (S.C.C.) at p. 58; see also *Hillis Oil & Sales Ltd.* v. *Wynn's Canada Ltd.,* [1986] 1 S.C.R. 57. *Hamilton and District Sheet Metal Contractors Inc.,* [1981] OLRB Rep. June 672, *The Corporation of the City of Sault Ste. Marie,* [1994] OLRB Rep. April 496. The contract should be construed as a whole, giving effect to all of its terms, so long as this does not result in an absurdity: *Holt* v. *Corporation of the City of Thunder Bay,* (2003), 65 O.R. (3d) 257 (C.A.) at p. 263. *Belleville Police Services Board* (2000), 91 L.A.C. (4th) 99 (Goodfellow). The contract must also be interpreted with a view to the labour relations considerations involved, and in particular, the practical realities of the construction industry: *Provincial International Cranes Inc.,* [1998] OLRB Rep. Nov./Dec. 1004.

25. The interpretive approach applied in *Bruce Power supra* has been applied by the Board in subsequent cases, including: *Hydro One Inc.*, [2011] OLRB Rep.

September/October 534; *Hydro One Networks Inc.,* [2012] OLRB Rep. July/August 697; *Electrical Trade Bargaining Agency,* [2014] CanLII 10375 (March 3, 2014).

26. Canadian courts continue to follow the same approach. In *RBC Life Insurance Company v. Janson* (2013), 116 O.R. (3d) 264 at p. 272, the Ontario Superior Court of Justice stated, "the task of interpreting a contract or statute requires an examination of the context in which the language appears". Similarly, Mr. Justice Perell of the same Court wrote in *Fontaine v. The Attorney General of Canada* (2014), 122 O.R. (3d) 1 at p. 11 that "in interpreting a contract, the court may have regard to the surrounding circumstances, that is, the factual background and the purpose of the contract". Likewise, the Supreme Court of Canada and the Ontario Court of Appeal have stated that the "principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": *Sattva Capital Corp. v Creston Moly Corp.*, [2014] SCC 53; *1298417 Ontario Ltd. v. The Corporation of the Town of Lakeshore* (2014), 122 O.R. (3d) 401 (C.A.); M*artenfeld v. Collins Barrow Toronto LLP* (2014), 122 O.R. (3d) 568 (C.A.).

27. Returning to the world of collective agreement interpretation, a more specific principle of interpretation is that all words in a collective agreement are presumed to have meaning: *Toronto District School Board* (2011), 205 L.A.C. (4th) 8 (Luborsky); *Hydro One Inc.,* [2013] OLRB Rep. September/October 1048; see also *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 (C.A.).

28. However, all of these principles are only guidelines. The adjudicator must always consider the facts of each individual case, the applicable contract language, and the context of the situation.

29. In this case, the Board is dealing with a grievance over the failure of Hydro One to pay subsistence allowance. The purpose of subsistence allowance is to compensate the employee for the cost of securing accommodation in order to be able to work at a work site that is remote from the employee's home. Hydro One, like any other employer applying the terms of a collective agreement, has a legitimate interest in ensuring that the accommodation secured by the employee is genuine in terms of both financial commitment and independent living arrangements. To put it more bluntly, Hydro One has the right to protect itself against fraudulent or manufactured claims for subsistence allowance. On the other hand, Hydro One cannot refuse to pay subsistence allowance to an employee who meets the requirements of the collective agreement by imposing higher standards than those set by the collective agreement.

30. The Board will now consider the facts of this case. Hydro One has conceded that Mr. Brooks has demonstrated the necessary degree of financial commitment and that he regularly eats and sleeps at the unit. Hydro One's only point of contention is that Mr. Brooks shares a bathroom and shower with the renters of four other apartments. Hydro One says this fact alone is sufficient to prove that his unit is not "self-contained", and

hence he is not eligible to receive subsistence allowance. Hydro One says that Mr. Brooks must meet "all of the elements of the article and not just some of them".

31. Therefore, the Board must look at exactly what the article says and what it does not say. One striking feature of the article is that it contrasts a "self-contained domestic establishment" with a "boarding house facility". The former is eligible for subsistence allowance but the latter is not. The parties drew an express distinction by choosing the language that they did. The article also specifically lists a "dwelling house" and an "apartment" as examples of a "self-contained domestic establishment".

32. One question that must be answered is: does Mr. Brooks reside in a "boarding house facility"?

33. In argument, counsel for the Union relied upon the Wikipedia definition of "boarding house". Counsel for Hydro One criticized this definition as vague and unhelpful, but did not offer a competing definition.

34. The term "boarding house" is not a technical one that requires expert evidence to ascertain its meaning. Wikipedia defined it in the following way:

> A **boarding house** is a house (frequently a family home) in which lodgers rent one or more rooms for one or more nights, and sometimes for extended periods of weeks, months, and years. The common parts of the house are maintained, and some services, such as laundry and cleaning, may be supplied. They normally provide "bed and board", that is, at least some meals as well as accommodation. A "lodging house", also known in the United States as a "rooming house", may or may not offer meals. Lodgers legally only obtain a licence to use their rooms, and not exclusive possession, so the landlord retains the right of access.[1]

35. The Wikipedia definition is consistent with other general and legal dictionary definitions of the term. The *American Heritage Dictionary* defines a boarding house as "a house where paying guests are provided with meals and lodging". *Collins English Dictionary* says that a boarding house is "a private house in which accommodation and meals are provided for paying guests".

36. Commentary drawn from outside the legal and lexicographic world are also consistent in associating the term "boarding house" with the provision of meals, and the consuming of those meals in a common area. To name just two, there is the classic comic strip "Our Boarding House" that featured Major Amos Hoople, and the Victoria Glendenning biography *Jonathan Swift, a portrait* (Toronto: Doubleday, 1998) that noted in "boarding . . . one generally ate at a common table with other boarders, and the proprietor".

37. Accordingly, the term "boarding house" connotes the provision of meals, and the consuming of meals in a common area. Those two aspects are notably absent on the facts of this case. Accordingly, Hydro One's position that Mr. Brooks resides in a boarding house must be fully and forcefully rejected.

38. There remains the issue of whether Mr. Brooks lives in a "self-contained" unit. Hydro One relies on the decision of Vice-Chair Hayes in *Hydro One* cited above to assert that he does not, because he shares a bathroom and shower with four other units. Hydro One also relies on provisions of the *Income Tax Act* and an Income Tax Interpretation Bulletin.

39. Firstly, the facts in the case before Vice-Chair Hayes are light years from the facts in this case. That case involved three young people living in separate bedrooms in their parents' home. From the scant factual summary in that case, there is no reason not to believe that the family shared meals, common areas, and entertainment facilities as most families do. That is completely dissimilar to Mr. Brooks' living arrangements.

40. This panel has no problem with Vice-Chair Hayes' conclusion that a pre-condition for subsistence allowance is that the employee must reside in a "self-contained" unit. That is a clear prerequisite expressly contained in the language of the collective agreement. However, with respect, his reliance on the *Income Tax Act* in interpreting the collective language was unnecessary to his conclusion (and hence *obiter dicta*) and was misplaced.

41. The collective agreement does not expressly incorporate the *Income Tax Act* definition of "self-contained". Nor is the *Income Tax Act* definition brought to bear on the language of the collective agreement by necessary implication. Ms. Campbell was clear in cross-examination that she did not refer to any provision of the *Income Tax Act* or any Income Tax Interpretation Bulletin in denying Mr. Brooks his entitlement to subsistence allowance. Rather reference to the *Income Tax Act* to support the denial appears to be an after the fact justification by Hydro One.

42. There is no necessity or valid labour relations reason for the Board to interpret the subsistence allowance provision of the collective agreement in reliance on the *Income Tax Act* as opposed to applying the normal rules of collective agreement interpretation. The Board has on multiple occasions declined to interpret or apply the provisions of the *Income Tax Act* in the absence of an express provision in the collective agreement requiring the Board to do so: *Calligaro Tile Company Limited.* [1989] OLRB Rep. October 1014*; E.S. Fox Limited*, [1993] OLRB Rep. October 970; *King-Con Construction Ont. Ltd.*, [2004] OLRB Rep. May/June 560. Therefore, the Board will determine the meaning of "self-contained" based upon ordinary principles of collective agreement interpretation.

43. Before doing so, it is worthwhile to note two further facts. Firstly, section 248 of the *Income Tax Act* is silent on the issue of where a person's bathroom is located, as it merely stipulates that a "self-contained domestic establishment means a dwelling-house, apartment, or other similar place of residence in which a person as a general rule eats and sleeps". Secondly, the Income Tax Interpretation Bulletin relied on by Hydro One is quite clear that its purpose is to determine whether certain "benefits received or enjoyed by an employee from an office or employment" are taxable. Accordingly, its purpose is to decide whether monies received are taxable and not to determine whether monies are payable under the provisions of a collective agreement.

44. Thirdly, one must read the decision in *Hydro One* (Hayes) carefully.

45. At paragraph 8 thereof, the Board referred to an Income Tax Interpretation Bulletin in the following passage:

> ...
>
> 8. One of those criteria, found at subsection 6(6)(a)(i) of the ITA, is that the taxpayer maintain "at another location a self-contained domestic establishment as the taxpayer's principal place of residence". Subsection 48(1) states that "'self-contained domestic establishment' means a dwelling house, apartment or other similar place of residence in which place a person as a general rule sleeps and eats". Income Tax Interpretation Bulletin No. IT-91R4 dated June 17, 1996 explains that "a residence is considered to be a self-contained domestic establishment if it is a living unit with restricted access that contains a kitchen, bathroom, and sleeping facilities. A room (or rooms) in a hotel, dormitory, boarding house or bunkhouse would not ordinarily be a self-contained domestic establishment".
>
> ...

46. However, at paragraph 10 of that same decision, the Board noted the potential limitations of the application of the Bulletin:

> 10. Insofar as the *ITA* and the relevant Interpretation Bulletin is concerned, the union points to a letter received from the Income Tax Rulings Directorate which stated that "while a question of fact, it is possible that shared rental accommodations, such as an apartment or a house, could reasonably be considered as a SCDE [self contained domestic establishment] of an individual for the purposes of a particular provision of the Act, even though certain common facilities,

> such as a kitchen or bathroom, may otherwise be shared with another person. However, the CRA would need to consider all relevant facts and circumstances of the particular situation, including the provision of the Act being applied ...".

47. Although neither party cited any particular case applying the *Income Tax Act* provision or the Income Tax Interpretation Bulletin, the Board's research found that the federal tax courts have interpreted the provision in a purposive way, and have not required "all the elements" identified by Hydro One to be present as a prerequisite to a finding that a particular premises or unit is a "self-contained domestic establishment": *Moczulski v. The Queen,* 2003 DTC 3982 (March 26, 2003); *Denis v. The Queen.* 2007 TCC 656 (CanLII) (November 1, 2007).

48. In any event, in *Hydro One* (Hayes), it was unnecessary for the Board to explore the "shared bathroom" issue specifically, as the Board concluded at paragraph 15 that the grievors in that case were "in a similar position" to persons living "in a boarding house with no self-contained facilities". Hence, the facts of *Hydro One* (Hayes) are completely distinguishable and this panel is not required or persuaded to apply the ruling therein to the facts of this case. The rule of arbitral deference only applies where the "parties, issue and relevant collective agreement language are identical": *Bluewater supra* at p.153.

49. Rather, this panel can approach the issue in this case afresh, having regard to the language, context and purpose of the collective agreement. The Board then needs to answer this question: is Mr. Brooks' unit a self-contained domestic establishment for the purpose of this collective agreement?

50. *Webster's New World Dictionary* defines "self-contained" as "having within oneself or itself all that is necessary" and "domestic" as "having to do with the home or housekeeping". Therefore, in ordinary parlance, the Board is seeking to ascertain whether Mr. Brooks' unit has everything that is necessary for a home or housekeeping. This determination is to be made in the context of a provision that has been put in place for the purpose of compensating an employee for the cost of securing accommodation in order to be able to work at a work site that is remote from the employee's home.

51. Let us then consider the facts of Mr. Brooks' living arrangements. He lives in a private space. He needs a key to access his unit from the outside by going through an entry door up a dedicated stairwell to the upstairs units. His own unit locks with a separate key. Certainly, these aspects are entirely consistent with a self-contained establishment as opposed to a common or shared premises.

52. Within the unit, one finds all the normal things associated with domestic life: a refrigerator, crockpot, one-burner stove, sink, toaster, coffee machine, microwave oven, telephone, desk, flat screen television, table, bed, window coverings and an air-

conditioning unit. The only exceptions are the bathroom and shower. However, they are located steps away and shared with four other persons.

53. There is a common laundry room available to tenants of all the units, although Mr. Brooks only used it once. Common laundry rooms are often found in Canadian apartment buildings. Therefore, the presence of a common laundry room does not impact on the issue before the Board; *Moczulski supra*.

54. Viewing the situation in its entirety, and having regard to the purpose of the collective agreement provision, the Board finds that Mr. Brooks' unit meets the definition of a "self-contained domestic establishment". It is clearly a private place of residence, equipped with all the usual domestic equipment and facilities inside the unit, except for the bathroom and shower located just outside the unit. It is not a place where there are no locks on the doors, or where meals are made and shared in a common area. Mr. Brooks is not living in his parents' house. Instead, Mr. Brooks is living in a *bona fide*, albeit extremely basic, apartment.

55. In the Board's view, this is sufficient. It is not mandatory that there must be an ensuite washroom and shower for a unit to be a "self-contained domestic establishment". The unit only needs to meet the minimum requirements of the collective agreement provision. It need not be a unit that would be desired accommodation for a business tycoon or elite athlete. The test is not whether one would find Donald Trump or Eugenie Bouchard residing there. The provision was negotiated with the needs and tastes of itinerant construction workers in mind, and the basic unit at issue in this case is reflective of that. Hydro One is not at liberty to impose more onerous conditions than those set in the collective agreement. If Hydro One wanted the *Income Tax Act* standard to apply, it needed to say so expressly. In any event, it appears that Mr. Brooks' unit would meet that standard, as it is properly understood.

56. Furthermore, Mr. Brooks' unit is definitely an "apartment" as that term is commonly understood. In fact, an "apartment" is given as an example of a self-contained domestic establishment within the governing article. Accordingly to the English case law provided by the Union (the decision of the House of Lords in *Collins supra*; and the cases cited therein, including *Curl v. Angelo*, [1948] 2 All E.R. 189 and *Goodrich v. Paisner*, [1957] AC 65), the unit is also properly considered a "dwelling house", another example of a self-contained domestic establishment within the article. Separate bathrooms and showers are apparently not uncommon and not an impediment to "dwelling house" status in England. The Board might also note that in certain Canadian communities where there is no sewer and watermain system, it would be unjust to deny an employee subsistence allowance where the employee has to use an outside lavatory attached to a septic tank due to the fact that local conditions do not permit domestic establishments to have indoor plumbing. Simply put, the mere fact that Mr. Brooks' unit does not have a bathroom and shower inside the unit does not in itself prevent the unit from being properly regarded as a self-contained domestic establishment.

57. In the Board's view, it would be manifestly inequitable, and contrary to the intent and language of the collective agreement, to find that Mr. Brooks' unit does not meet the definition of a self-contained domestic establishment where other units in the exact same residential building would meet the definition. The only difference is that Mr. Brooks' bathroom and shower facilities are located adjacent to, rather than inside, his unit. The Board finds that this is not a material difference on the facts of this case. As the Supreme Court of Canada and Ontario Court of Appeal have said, the context and factual matrix are integral to the proper interpretation of the contract language in each particular case.

CONCLUSION AND DISPOSITION

58. For the reasons given above, the Board concludes that Mr. Brooks' unit qualifies as a "self-contained domestic establishment" under the collective agreement.

59. Therefore, the Board declares that Hydro One has violated the collective agreement by not paying subsistence allowance to Mr. Brooks in accordance with the terms of the collective agreement.

60. The Board directs Hydro One to compensate Mr. Brooks forthwith for any damages arising from the aforesaid violation. The Board remains seized of this matter to deal with any issue pertaining to the calculation of such damages or any other remedial issue.

2426-14-G International Union of Elevator Constructors, Local 50, Applicant v **KONE, Inc.**, Responding Party

Practice and Procedure – Witness – After this grievance was referred to the Board for arbitration, the grievor, with the union's assistance, filed a complaint against the employer with the Human Rights Tribunal of Ontario, claiming discrimination in employment – The employer did not learn of the HRTO matter until after the first day of hearing of the arbitration, in the middle of its witness' examination-in-chief – According to the employer, the basis of the human rights complaint related in large measure to the substance of the grievance – The employer sought permission from the Board to speak to its witness to be able to file a response to the HRTO complaint in which the employer would be asking the Tribunal to defer dealing with the complaint in light of the arbitration already in progress – Permission granted; other issues raised by the employer to be dealt with at the start of the next day of hearing – Matter continues

BEFORE: *Owen V. Gray*, Vice-Chair

DECISION OF THE BOARD: January 20, 2015

1. This is a referral of a grievance to the Board for determination under section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The grievance alleges that on October 8, 2014, the responding party ("KONE") discharged Penny Cassidy ("the grievor") without cause from her employment in a bargaining unit represented by the applicant.

2. The Board began its hearings in this matter on November 27, 2014. In accordance with the usual practice, the employer was required to present its evidence first on the question whether, as it alleges, it had had cause to discharge the grievor. The examination-in-chief of its first witness, Kelly Kain, was not quite complete by the end of that hearing day. The hearing then adjourned to January 29 and February 5, 2015.

3. The Board has now received a letter dated January 16, 2015 from employer counsel, stating (among other things) that:

> Unbeknownst to KONE, the Grievor, with the assistance of IUEC Local 50 and its counsel Mr. Ardron, had on November 21, 2014 (six days before the s.133 hearing) filed an Application with the Human Rights Tribunal of Ontario. The Application was served on KONE by the Tribunal on December 4, 2014 alleging that KONE had discriminated against Ms Cassidy in her employment on the basis of her sex and a disability.
>
> ...
>
> Many of the issues now raised in the Application relate directly and inferentially to documents that form part of Ms Cassidy's discipline record that had already been put into evidence at the hearing before Vice Chair Grey [sic] on November 27, 2014.

4. Counsel observes that the Application to the Human Rights Tribunal of Ontario ("the HRTO") states that the facts on which it relies are not "part of another proceeding that is still in progress." Counsel's letter then states that:

> It is KONE's respectful submission that it ought not be required to defend its actions simultaneously before the OLRB and the HRTO and therefore seeks the following Directions of the Board.
>
> 1. A Direction to adjourn the hearing dates scheduled for January 29, 2015 and February 3, 2015 [sic] to allow time for

> the HRTO to answer KONE's request of the Tribunal that the Tribunal defer the Application to be dealt with under the arbitration hearing already commenced before the Board.
>
> 2. A Direction that KONE be permitted to amend its Response to allegations in the Application that had not been raised in the s.133 referral.
>
> 3. A Direction that counsel for KONE be permitted to speak freely with Mr. Kain (currently under examination in chief) about all issues included in the Application regardless of whether or not he has already given evidence touching on some of those issues.

I note that the hearing dates are not correctly stated in the first request: the second of the scheduled continuation dates is February 5, 2015 (not February 3, 2015).

5. It is not apparent from counsel's letter that there is any need to address its requests before the hearing in this matter resumes on January 29, 2015, at which time they could be the first order of business.

6. Union counsel's letter of January 20, 2014, however, indicates that KONE is obliged to deliver a Response to the HRTO application no later than January 21, 2015 – that is, tomorrow. This lends some urgency to the third request, particularly since there is no sign of consent by or on behalf of the applicant in those proceedings to an extension of that deadline (nor is it apparent whether such a consent would be effective to relieve KONE of the obligation to deliver a Response by January 21, 2015, which is a question that only the HRTO could determine). Union counsel's statement that he is "seeking instructions with respect to the third direction and will advise [employer counsel] should the Union consent" is cold comfort in the circumstances.

7. Accordingly (and notwithstanding union counsel's surprising assertion that employer counsel did not first seek his consent to the requests he set out in his letter to the Board), I direct as follows: if and only to the extent that he needs to do so before January 29, 2015, in order to file a timely Response in the HRTO matter, counsel for KONE may speak with Mr. Kain concerning matters about which Mr. Kain has testified in this proceeding, provided that such issues are arguably relevant to KONE's position in the HRTO matter and that he identifies the issues discussed pursuant to this direction (but not the contents of the discussions) when the hearing in this matter resumes.

8. Otherwise, consideration of employer counsel's requests will be the first order of business when the hearing in this matter next resumes. Counsel and the parties should come to that hearing prepared for the possibility that after hearing the parties' submissions thereon, the Board may continue hearing evidence on the merits that day.

0068-14-R Canadian Union of Public Employees and its Locals 17-1, 17-04 and 1813, Applicant v **Lakeland Power Distribution Ltd.**, Bracebridge Generation Ltd., Parry Sound Power Corporation, Responding Parties

Representation Vote – Sale of Business – The parties conceded that a sale of business, and intermingling, had occurred – They also agreed to early termination of subsisting collective agreements, with a view to negotiating fresh agreements with the new or merged employers – The only issue for the Board was how to deal with the wishes of the "office staff" in the newly proposed all-employee units – Only two of the seven clerical employees (28%) had previously been unionized – CUPE argued for a vote of the entire bargaining unit; the employers contended that no vote was required, having regard to the disparity in the status of the employees in dispute – The Board held that a vote of only the clerical employees was appropriate: if a vote is to have more than symbolic value, it must, at a minimum, present the potential for its contributing meaningfully to the resolution of the issue between the parties – Vote ordered

BEFORE: *Derek L. Rogers*, Vice-Chair, and Board Members *Paul LeMay* and *D. A. Patterson*

APPEARANCES: *Dave Steele, Debbie Oldfield, Stephen Boyle, Kevin Robertson, Shawn Morrison, Matt Sandtner* and *Darrel Aulbrook* for the applicant; *Richard J. Charney, Chris Litschko, Miles Thompson, Monica Hall* and *Ted Panagiotoulias* for the responding parties

DECISION OF THE BOARD: January 8, 2015

1. This is an application filed under the section 69 and subsection 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). It arose in connection with a merger of certain of the responding parties, all as described in detail in the Agreed Statement of Facts and the Memorandum of Agreement that are set out in full below.

2. The title of proceedings is hereby amended as provided for in paragraphs 1 and 2 of the parties' Memorandum of Agreement.

3. The Agreed Statement of Facts is as follows:

AGREED STATEMENT OF FACTS
(November 24, 2014)

The Parties

1. Bracebridge Generation Ltd. ("**Bracebridge Generation**"), Lakeland Power Distribution Ltd. ("**Lakeland Distribution**") and Parry Sound Power Corporation ("**PS-Distribution**") are the only named Responding Parties that are bound to bargaining rights of and collective agreements with various locals of the Canadian Union of Public Employees ("**CUPE**").

2. Neither Lakeland Holding Ltd. ("**Lakeland HoldCo**") nor Parry Sound Hydro Corporation ("**PS HoldCo**") perform or have performed any distribution or generation work in the electricity sector. Further, neither of these two holding companies is bound to bargaining rights of or by a collective agreement with CUPE or any local of CUPE.

3. Parry Sound Energy Services Company ("**PSESC**"), pursuant to Articles of Amalgamation dated January 1, 2013 (Responding Parties' Book of Documents, Tab 1)' merged with Parry Sound Powergen Corporation ("**PS-Generation**"), following which PS-Generation became the surviving employer. In a Letter of Understanding between PS-Generation and CUPE, Local 17-1 dated November, 2012 (Responding Parties' Book of Documents, Tab 2), PS-Generation, as the surviving employer, agreed that it would continue to be bound by the collective agreement between PSESC and Local 17-1 until a new collective agreement was negotiated between the parties.

4. Local 17 is one of the founding locals of the Canadian Union of Public Employees in 1963. Local 17 was granted its Charter on September 24, 1963.

5. Local 1813 was certified as the bargaining agent for Bracebridge Water, Light and Power Commission, the predecessor employer of Bracebridge Hydro-Electric Commission, on February 21, 1972. On September 1, 2000, Bracebridge Hydro-Electric Commission was incorporated as Bracebridge Generation and Lakeland Power Distribution.

Introduction

6. This matter involves an Application by CUPE and its Locals 1813, 17-1 and 17-04 (the "**Applicants**") to retain bargaining rights in light of a merger between a variety of entities involved in the electrical power industry.

7. In particular, Lakeland HoldCo wholly owns two subsidiaries, Bracebridge Generation and Lakeland Distribution (together, the "**Lakeland Subsidiaries**"), which are involved in the generation and distribution of electricity respectively and which, prior to the merger, primarily carried on business in the District of Muskoka and parts of Almaguin Highlands in the District of Parry Sound.

8. Prior to the merger, Parry Sound HoldCo wholly owned two subsidiaries, PS-Generation and PS-Distribution (together, the "**Parry Sound Subsidiaries**"), which were involved in the generation and distribution of electricity respectively and which primarily carried on business in the Town of Parry Sound ("**Parry Sound**").

9. For the purposes of collective bargaining, the electricity distribution subsidiaries of Lakeland HoldCo and Parry Sound HoldCo (Lakeland Distribution and PS-Distribution) have merged, as did the holding companies' electricity generation subsidiaries, (Bracebridge Generation and PS-Generation), effective July 1, 2014, as set out in greater detail below.

Background

10. Prior to the merger, all of the issued and outstanding shares of Lakeland HoldCo were owned by the Town of Bracebridge ("**Bracebridge**"), the Village of Burk's Falls ("**Burk's Falls**"), the Town of Huntsville ("**Huntsville**"), the Municipality of Magnetawan ("**Magnetawan**"), and the Village of Sundridge ("**Sundridge**"). The shareholdings of Lakeland HoldCo were: Bracebridge (65.11%); Burk's Falls (3.96%); Huntsville (25.13%); Magnetawan (1.47%); and Sundridge (4.33%).

11. The Lakeland Subsidiaries were incorporated by Bracebridge, Burk's Falls, Huntsville, Magnetawan and Sundridge pursuant to section 142 of the *Electricity Act, 1998* (the "**EA**") for the purpose of distributing electricity, electricity generation and providing other electricity services to the residents of the

incorporating locations. As stated above, the Lakeland Subsidiaries were wholly owned by Lakeland HoldCo.

12. Bracebridge Generation is bound by a collective agreement with CUPE, Local 1813, with a term of July 1, 2013 to June 30, 2017 (the "**BG Collective Agreement**", Responding Parties' Book of Documents, Tab 3).

13. Lakeland Distribution is also bound by a collective agreement with CUPE, Local 1813, with a term of July 1, 2013 to June 30, 2017 (the "**LD Collective Agreement**", Responding Parties' Book of Documents, Tab 4).

14. Prior to the merger, all of the issued and outstanding shares of Parry Sound HoldCo were owned by the Town of Parry Sound.

15. The Parry Sound Subsidiaries were incorporated by Parry Sound pursuant to section 142 of the EA for the purpose of distributing electricity, electricity generation and providing other electricity services to the residents of Parry Sound. As stated above, all of the issued and outstanding shares of the Parry Sound Subsidiaries were owned by Parry Sound HoldCo.

16. PS-Distribution is bound by a collective agreement with CUPE, Local 17-04, with a term of January 1, 2012 to December 31, 2015 (the "**PS-Distribution Collective Agreement**", Responding Parties' Book of Documents, Tab 5).

17. PS-Generation is bound by a collective agreement with CUPE, Local 17-1, with a term of January 1, 2012 to December 31, 2015 (the "**PS-Generation Collective Agreement**", Responding Parties' Book of Documents, Tab 6).

18. Pursuant to a Merger Participation Agreement, dated December 16, 2013 (the "**Merger Agreement**", Responding Parties' Book of Documents, Tab 7), the holding companies Lakeland HoldCo and Parry Sound HoldCo agreed to the following mergers:

a. Parry Sound HoldCo would merge into Lakeland HoldCo and the Town of Parry Sound would become a shareholder of Lakeland HoldCo, owning approximately 13.5% of the issued and outstanding shares of Lakeland HoldCo;

b. PS-Distribution would merge into Lakeland Distribution (where Lakeland Distribution would become the surviving employer) to form a new merged electricity distribution company to serve the residents of Bracebridge, Burk's Falls, Huntsville, Magnetawan, Sundridge and Parry Sound. All of the issued and outstanding shares of Lakeland Distribution would continue to be owned by Lakeland HoldCo; and

c. PS-Generation would merge into Bracebridge Generation (where Bracebridge Generation would become the surviving employer) in order to form a new merged electricity generation company. All of the issued and outstanding shares of Bracebridge Generation would continue to be owned by Lakeland HoldCo.

19. Pursuant to the Merger Agreement, the above mergers became effective on July 1, 2014.

20. The mergers were akin to a take-over of Parry Sound HoldCo and the Parry Sound Subsidiaries. Prior to the mergers, Parry Sounds HoldCo and the Parry Sound Subsidiaries were struggling to remain economically viable. In particular, PS-Generation was at a roadblock with respect to securing the necessary funding for a vital generation plant upgrade. Parry Sound HoldCo and the Parry Sound Subsidiaries were in need of the information technology, engineering, and human resources of Lakeland HoldCo and the Lakeland Subsidiaries, as well as their financial strength. Day-to-day activities were becoming onerous at all of the Parry Sound companies where they fell behind in many areas and could not keep up. It became evident that the Parry Sound companies would not be able to survive financially, which would affect customer service, health and safety, and compliance with regulatory requirements. The Lakeland companies were able to provide the required resources and financial capabilities required for the Parry Sound employees to stay employed, and for the companies to regain strength in customer service, health and safety and regulatory compliance.

21. An outline/chart of the collective agreements in force with the Lakeland Subsidiaries and Parry Sound Subsidiaries and an approximate shareholding of Lakeland HoldCo both prior to and following the merger is attached as Appendix I.

Mergers

22. On or about January 20, 2014, all non-union and bargaining unit employees of PS-Distribution and PS-Generation were advised of the impending merger and informed of any changes resulting to their positions, wages and benefits following the effective date of the mergers. For greater certainty, all bargaining unit and non-union employees of PS-Distribution and PS-Generation were advised that they would continue to be employed by Lakeland Distribution and Bracebridge Generation, respectively, following the mergers. One bargaining unit billing employee who was employed by PS-Distribution accepted a non-union position in Lakeland HoldCo.

23. Bracebridge Generation is an electric generation company. Prior to the merger, it employed four people: two were supervisors, and two were members of the bargaining unit represented by Local 1813. In addition, there was one vacant bargaining unit Labourer position, which remains vacant. The two bargaining unit employees were engaged in generation work as technicians.

24. PS-Generation was also an electric generation company. Prior to the merger, it employed two people, both of whom were bargaining unit employees represented by Local 17-1 and performed work as technicians.

25. Following the merger, the two bargaining unit technicians of PS-Generation became employed by Bracebridge Generation, and occupy the same position that they had at PS-Generation prior to the merger. Bracebridge Generation now employs six people, consisting of two supervisors and four bargaining unit technicians represented by Locals 1813 or 17-01. There is one vacant bargaining unit Labourer position.

26. Lakeland Distribution is an electricity distribution company. Prior to the merger, it employed 16 people, nine of whom were members of the bargaining unit represented by Local 1813. In addition, there was a vacancy for one bargaining unit Journeyperson in Bracebridge. The nine bargaining unit employees consisted of technicians and linemen engaged in distribution work, as well as one Stockkeeper. Of the seven non-union employees, there were a total of 4.5 employees (excluding managers) consisting of three billing clerks, a part-time collection person and a full-time conservation person. Following the merger, the part-time non-union collections employee became full-time.

27. PS-Distribution was an electricity distribution company. Prior to the merger, it employed two non-union supervisors or managers, and 6.5 employees were members of the bargaining unit represented by Local 17-04. Of the members of the bargaining unit, four employees were engaged in powerline maintenance and 2.5 performed billing / clerical work. On January 20, 2014, one of the 2.5 bargaining unit billing / clerical employees accepted a non-union position with Lakeland HoldCo. Effective the date of the merger, the billing / clerical employee started in the non-union position which reduced the billing / clerical employees in the bargaining unit to 1.5, thus reducing PS-Distribution's bargaining unit to 5.5 employees.

28. One bargaining unit billing employee of PS-Distribution in account payables was permanently laid-off in October, 2013 as a cost-cutting measure unrelated to any pending merger. In response, a policy grievance (2013-02) was filed by Local 17-04, which was ultimately settled on January 21, 2014 (attached as Appendix II [*but not included with the Board's decision*]). In the settlement, it was agreed that the employee would be given eight weeks' pay (as the employee was not returning to the workplace) and that all parties had conducted themselves in good faith. The Applicant asserts that this one employee should augment the numbers outlined in the preceding paragraph. The Responding Parties object on the basis that the facts set out in this paragraph are irrelevant, and maintain that the numbers should remain as outlined in paragraph 27.

29. Following the merger, Lakeland Distribution now employs 23.5 employees, of which nine are non-union, and 14.5 are members of the bargaining unit represented by Locals 1813 or 17-04. There remains one vacancy for a bargaining unit Journeyperson in Bracebridge.

Intermingling

30. Prior to the merger, there were instances of intermingling in which bargaining unit employees of the Lakeland Subsidiaries and the Parry Sound Subsidiaries performed work typically performed by the other. For example employees of Lakeland Distribution and PS-Distribution shared trucks as they performed their work. Further, Lakeland Distribution bargaining unit employees assisted PS-Distribution with metering and the engineering of its distribution system.

31. The Responding Parties agreed, pursuant to a Management Services Agreement (dated December 17, 2013, Responding Parties'

Book of Documents, Tab 8), and two Memoranda of Understanding (dated January 31, 2013 and August 1, 2013, Responding Parties' Book of Documents, Tabs 9 and 10), to cooperate in sharing of resources and personnel leading up to the effective date of the merger.

32. That intermingling continued, and in fact, was steadily enhanced, up to the effective date of the mergers on July 1, 2014 and thereafter.

33. Following the mergers, there occurred a significant intermingling of personnel and resources between the merged entities. As a result, it would not make labour relations sense for each of Bracebridge Generation and Lakeland Distribution to be bound by two collective agreements with respect to groups of employees performing essentially the same duties.

34. There has been a significant operational integration of the businesses of Lakeland Distribution and the former PS-Distribution, and Bracebridge Generation and the former PS-Generation. Aside from the integration of management, the entities have planned for continued and increased synergy of billing, information technology, regulatory compliance, system backup, security, redundancy, resource expertise, transport and work equipment usage and upgrading, business processes, health and safety procedures training and certification, work planning, arrears management, payables and receivables, financial institution borrowing, stores materials planning and human resources functions going forward.

35. Furthermore, there has been a significant physical integration of employees from the various bargaining units at both Lakeland Distribution and Bracebridge Generation. There has been regular and consistent interchange and movement of employees between locations, with bargaining unit employees from the former Parry Sound Subsidiaries working side-by-side with the bargaining unit employees of the Lakeland Subsidiaries. PS-Distribution employees now work in six municipalities instead of one, and PS-Generation employees work at six generation stations rather than one. In addition to the regular and consistent sharing of bargaining unit personnel, resources and equipment are regularly shared by the bargaining units. Furthermore, job functions are often integrated, with employees from the different bargaining units working together and relying on one another in the execution of their duties. In addition, employees from the various bargaining units are trained together on various matters, including health and safety, work

planning and crew operations, all as part of the ultimate goal of complete integration and synergy across the merged entities.

36. In particular, the former PS-Distribution bargaining unit draws significantly on the resources of Lakeland Distribution, including both Lakeland Distribution bargaining unit personnel and their additional skill sets, stores inventory and planning, transport and work equipment, and a variety of streamlined and efficient processes and procedures. In particular, the PS-Distribution bargaining unit relies on the Lakeland Distribution bargaining unit for engineering, metering, work planning and job function accountability. Furthermore, with respect to Bracebridge Generation, there has been a significant integration of business operations. For example, employees from both generation bargaining units have been heavily involved in working together to address the water control regulatory regimes in Parry Sound and beyond. Furthermore, both bargaining units have been heavily involved in ensuring the continued operation of the approximately 100 year old Cascade Generation Plant in Parry Sound, which is in need of upgrades due to its poor condition, and which has been deemed unsafe in certain areas. Bracebridge Generation's resources were and continue to be heavily relied on to improve the plant. In the past nine years, Bracebridge Generation staff have completed four multi-million dollar upgrades and constructed one new plant, investing approximately $30 million. The Cascade Generation Plant cannot operate without such upgrades and investment, as the old technology is time consuming, is deteriorating and is expensive to operate in comparison to more up-to-date technology.

37. With respect to billing / clerical functions, the merged entities have moved toward a more centralized payroll and payables system. Many of the administrative functions of the merged entities are being streamlined and synergized into the Lakeland Distribution models and systems. For example, the merged entities are moving toward a single billing engine, and the centralization of the finances and regulatory functions of the merged entities. The four non-union billing / clerical employees from Lakeland Distribution and the 1.5 union billing / clerical employees from the former PS-Distribution are functionally integrated and are trained as a single group of billing / clerical employees. As of January 2015, it is expected that the billing system will be centralized in Huntsville where all pre-merger Lakeland Distribution billing took place by non-unionized staff.

38. There have been some difficulties that have arisen from applying the different collective agreements to employees working side-by-side from the various bargaining units. For instance, the Lakeland Distribution bargaining unit is entitled to a one half hour lunch break per working day under Article 9 of the LD Collective Agreement. On the other hand, the PS-Distribution bargaining unit is entitled to a one hour lunch break per working day under Article 6 of the PS-Distribution Collective Agreement.

A. Generation

39. Prior to the merger, Bracebridge Generation had larger capacity than PS-Generation with respect to the number of electricity generation plants that it maintained (five) and with respect to the total wattage it produced (10,000,000 watts). PS-Generation oversaw one electricity generation plant, which produced 1,200,000 watts. In addition, prior to the merger, Bracebridge Generation employed four full-time employees, and had a vacancy for one bargaining unit Labourer. PS-Generation employed two.

B. Distribution

40. Prior to the merger, Lakeland Distribution was a larger entity than PS-Distribution. Lakeland Distribution had 9,850 customers, while PS-Distribution had 3,450 customers. Taking into account both non-unionized employees and bargaining unit employees, Lakeland Distribution employed 15.5 employees, whereas PS-Distribution employed 8.5.

41. Following the merger, the bargaining unit of Lakeland Distribution consists of nine employees, plus one vacant bargaining unit Journeyperson position. The PS-Distribution bargaining unit has 5.5 employees.

42. The bargaining units of Lakeland Distribution and PS-Distribution are not congruent. Prior to the merger, Lakeland Distribution did not include billing / clerical employees while the PS-Distribution bargaining unit did include billing / clerical employees. As a result, the positions / duties of four bargaining unit employees of PS-Distribution would be covered by the recognition clause of the LD Collective Agreement and nine Lakeland Distribution bargaining unit employees (and an additional vacant bargaining unit Joumeyperson position) are and would continue to be covered by the LD Collective Agreement.

C. Bargaining unit billing / clerical employees of PS-Distribution

43. Subject to paragraph 28 if relevant, there were 2.5 bargaining unit billing / clerical employees with PS-Distribution. On January 20, 2014, one of the billing / clerical employees accepted a non-union position with Lakeland HoldCo. Effective the date of the merger, the employee began working at Lakeland HoldCo, with the result that PS-Distribution's bargaining unit billing / clerical employee count was reduced to 1.5. Following the merger, 1.5 bargaining unit employees and 5 non-union employees perform similar duties with Lakeland Distribution.

44. The PS-Distribution Collective Agreement covers billing / clerical employees and has specific provisions dealing with these employees. The LD Collective Agreement does not cover billing / clerical employees.

Collective Agreement Provisions Related to Mergers/Amalgamations/Sale of Business

45. All four collective agreements contain provisions (Article 16 in both the PS-Distribution Collective Agreement and the PS-Generation Collective Agreement, and Appendix "B" in both the BG Collective Agreement and LD Collective Agreement) dealing with merger and amalgamation situations.

Conclusion & Issues to be Determined

46. The parties agree that an intermingling has occurred, and that relief ought to be granted pursuant to section 69(6) of the *Labour Relations Act, 1995*, S0 1995, c 1, Schedule A. The parties further agree that there ought to be one collective agreement that applies to all bargaining unit employees of Lakeland Distribution, and one collective agreement that applies to all bargaining unit employees of Bracebridge Generation. Thus, the issues for determination are agreed to be as follows:

1. Which collective agreement ought to apply to the merged Bracebridge Generation bargaining unit;

2. Which collective agreement ought to apply to the merged Lakeland Distribution bargaining unit; and

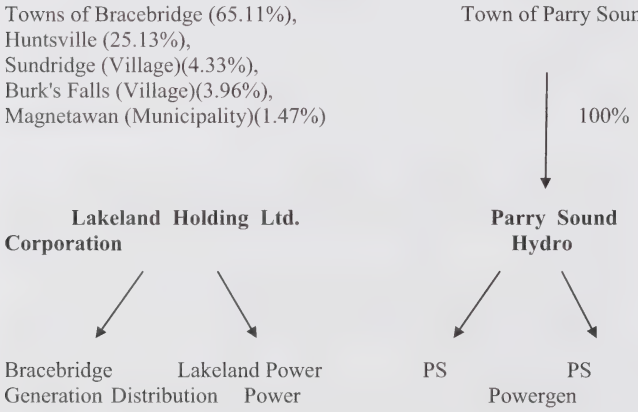
3. Whether the merged Lakeland Distribution bargaining unit should include or exclude billing / clerical employees.

APPENDIX I

A. Collective Agreements

Company	CUPE Local	Collective Agreement Term
Bracebridge Generation	1813	July 1/13 -June 30/17
Lakeland Power Distribution	1813	July 1/13 -June 30/17
Parry Sound Powergen Corporation	17-1	Jan. 1/12 - Dec. 31/15
B. Parry Sound Power Corporation	17-04	Jan. 1/12 - Dec. 3 1/15

B. Previous Corporate Structure



C. Corporate Structure Following Mergers (July 1, 2014)

Shareholdings of merged Lakeland Holding:

Bracebridge (56.31%), Huntsville (21.74%),
Sundridge (3.75%), Burk's Falls (3.43%),
Magnetawan (1.27%),
Parry Sound (13.50%)

4. The parties entered into the following Memorandum of Agreement (the "Memorandum"):

MEMORANDUM OF AGREEMENT
(November 25, 2014)

(a) **WHEREAS** the Canadian Union of Public Employees ("**CUPE**") and its Local 1813 is the exclusive bargaining agent for certain employees of Bracebridge Generation Ltd. ("**BG**"),

(b) **AND WHEREAS** CUPE and its Local 1813 is the exclusive bargaining agent for employees of Lakeland Power Distribution Ltd. ("**LP**"),

(c) **AND WHEREAS** CUPE and its Local 17-04 has been the exclusive bargaining agent for employees of Parry Sound Power Corporation ("**PS Distribution**"),

(d) **AND WHEREAS** CUPE and its Local 17-1 has been the exclusive bargaining agent of certain employees of Parry Sound Powergen Corporation ("**PS Generation**"),

(e) **AND WHEREAS** the BG Collective Agreement is for the term July 1, 2013 to June 30, 2017,

(f) **AND WHEREAS** the LP Collective Agreement is for the term July 1, 2013 to June 30, 2017,

(g) **AND WHEREAS** the PS Generation Collective Agreement is for the term January 1, 2012 to December 31, 2015,

(h) **AND WHEREAS** the PS Distribution Collective Agreement is for the term January 1, 2012 to December 31, 2015,

(i) **AND WHEREAS** the Responding Parties are the subject of a merger described more fully in the Agreed Statement of Facts dated November 24, 2014 entered into between the Applicant and the Responding Parties (collectively, the "**Parties**"),

(j) **AND WHEREAS** it is agreed by the Parties that in all the circumstances there has been a sale of a business within the meaning of section 69 of the *Ontario Labour* Relations *Act, 1995* (the "***Act***"), and an intermingling of employees within the meaning of the *Act*,

(k) **AND WHEREAS** on April 4, 2014 the Applicant filed with the Ontario Labour Relations Board (the "**Board**") an application pursuant to section 69 of the *Act* (the "**Application**") seeking certain relief as a result of such intermingling,

(l) **AND WHEREAS** the BG Collective Agreement and the PS Generation Collective Agreement both pertain to the electricity generation business and are hereinafter referred to as the "**Generation Agreements**",

(m) **AND WHEREAS** the LP Collective Agreement and the PS Distribution Collective Agreement both pertain to the electricity distribution business and are hereinafter referred to as the "**Distribution Agreements**",

(n) **AND WHEREAS** the Parties are desirous of fully and finally resolving all matters rising pertaining to and arising out of the Application,

NOW THEREFORE it is agreed:

1. PS Distribution is hereby added as a Responding Party to the Application and to this Memorandum.

2. Lakeland Holding Ltd., Parry Sound Hydro Corporation and Parry Sound Energy Services Corporation are hereby removed as Responding Parties to the Application and to this Memorandum.

3. The Responding Parties will continue to administer the Generation Agreements and the Distribution Agreements in accordance with the *status quo*, such that employees currently covered by a certain collective agreement will continue to be covered by that same collective agreement until and including December 31, 2015 or any statutory freeze therefrom pursuant to section 86 of the *Act*.

4. The Parties will commence collective bargaining in February of 2015 and will make every reasonable effort to conclude two separate collective agreements, namely a single Generation Agreement and a single Distribution Agreement, and all bargaining rights will be deemed to have merged into each of those two collective agreements. Each of these collective agreements will take effect on January 1, 2016 or at such later date upon which any such collective agreement is negotiated and ratified in accordance with the *Act*. For clarity, it is understood that:

(a) the BG Collective Agreement and the PS Generation Collective Agreement will for all purposes terminate and be replaced and superseded by a single Generation Agreement effective January 1, 2016 or such later date as the Parties may agree; and

(b) the LP Collective Agreement and the PS Distribution Collective Agreement will for all purposes terminate and be replaced and superseded by a single Distribution Agreement effective January 1, 2016 or such later date as the Parties may agree.

5. Subject to paragraph 6 below, the scope clause of the single Generation Agreement will be as set out in the BG Collective Agreement, and the scope clause of the single Distribution Agreement will be as set out in the LP Collective Agreement.

6. The Parties acknowledge that the BG Collective Agreement and the LP Collective Agreement exclude clerical employees while the PS Generation Collective Agreement and the PS Distribution Collective Agreement do not. It is agreed that the Parties will argue before the Board on November 25, 2014 whether such exclusion should continue or be discontinued, and the result, whether by Board decision alone or by Board decision following a representation vote, will determine the scope of the bargaining units for each of the Generation Agreement and the Distribution Agreement effective

January 1, 2016 with respect to clerical employees.

7. To effect the foregoing, the Parties agree that the respective terms of the BG Collective Agreement and the LP Collective Agreement ought to expire on December 31, 2015 rather than the current date of June 30, 2017. Pursuant to sub-section 58(3) of the *Act*, the Parties hereby seek the Board's consent to such early termination, and declare that this Memorandum is subject to such consent.

8. It is understood that if the Parties are unable to finalize a single Generation Agreement and/or a single Distribution Agreement by December 31, 2015, the provisions of the *Act* will apply in the normal course, including but not limited to the statutory freeze set out in section 86 of the *Act* and the right of either bargaining party to seek a "no-board report" which could lead to a lawful strike or lockout for either or both of the two merged bargaining units pertaining, respectively, to Generation and Distribution.

9. The Parties understand that Matt Sandtner ("**Sandtner**") is currently an employee of PS Distribution covered by the PS Distribution Collective Agreement as an apprentice powerline maintainer. It is agreed that Sandtner must report to the Bracebridge Operations Centre (the "**BOC**") by no later than July 1, 2015 to continue working in the same or similar position, but based at the BOC. Should Sandtner not so report, he will be deemed to be lawfully laid-off. Once reporting to the BOC, Sandtner must make himself available to report to the BOC for call-in work within 30 minutes of any such call. Despite paragraph 3 above, should Sandtner report to the BOC in accordance with this paragraph 9, his employment will thereafter be covered by the LP Collective Agreement until January 1, 2016 and any statutory extension thereto, following which his employment will be covered by the single Distribution Agreement. Nothing in this paragraph 9 impacts on management's general rights to administer the employment of Sandtner, nor does it impact upon Sandtner's right to resign from his employment.

10. Save and except paragraph 9 above, this Memorandum is enforceable as a settlement under sub-section 96(7) of the *Act*.

11. Paragraph 9 above is enforceable through the grievance procedure of the applicable collective agreement.

> 12. Given the aforesaid merger, the signatory non-trade union parties below are the remaining employers and can bind the Responding Parties.
>
> 13. The Parties request that the Board make the necessary declarations and orders to give effect to this Memorandum.

Canadian Union of Public Employees ("CUPE") and each of its Locals 17-1, 17-04, and 1813 executed the agreement, as did Lakeland Power Distribution Ltd. ("Lakeland Distribution") and Bracebridge Generation Ltd. ("Bracebridge Generation").

5. For ease of reference, the Board will continue the parties' references to the BG Collective Agreement, the PS Generation Collective Agreement, the LP Collective Agreement, and the PS Distribution Collective Agreement.

Evidence

6. The scope provisions of the BG Collective Agreement and the LP Collective Agreement, Article 2 in both instances, read as follows:

> **Article 2 – Recognition**
>
> The Company hereby recognizes the Union as the sole collective bargaining agent for all employees of the Company save and except Supervisor, persons above the rank of Supervisor, office staff, co-operative students, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week.

As recorded in the Memorandum, that provision is to constitute the scope clause of the single Generation Agreement and of the single Distribution Agreement, subject only to the decision of the Board regarding the continuation or elimination of the exclusion of "office staff".

7. On the agreed facts and as summarized in an exhibit filed without dispute, it is evident that:

> (i) prior to the merger, neither of the employer parties to the BG Collective Agreement and the PS Generation Collective Agreement employed persons in positions of "office staff" as the term is used in Article 2 of the BG Collective Agreement;
>
> (ii) prior to the merger, the employer party to the LP Collective Agreement employed four full-time and one part-time non-union clerical/billing employees; however, the part-time

employee became a full-time employee following the merger with the result that there were then five full-time non-union clerical/billing employees excluded from the bargaining unit under that collective agreement;

(iii) prior to the merger, the employer party to the PS Distribution Collective Agreement had employed two full-time and one part-time clerical/billing employees; they were included in the bargaining unit, but their number was reduced to one full-time and one part-time employee with the departure of an employee who had previously accepted a non-union position with Lakeland Holding Ltd., an entity that was removed from these proceedings by paragraph 2 of the Memorandum;

(iv) following the merger, the Bracebridge Generation operation had four bargaining unit positions occupied, one vacant bargaining unit position, and two non-union supervisors; and

(v) following the merger, the Lakeland Distribution operation employed five full-time non-union clerical/billing employees, one full-time and one part-time clerical/billing bargaining unit employees, 13 other full-time bargaining unit employees, and four non-union supervisors; it also had one vacant bargaining unit journeyperson position.

8. The applicant made no submissions with regard to the individual referred to in paragraph 28 of the Agreed Statement of Facts and did not assert that the situation was relevant to the issue submitted for the Board's determination. Having regard for the facts recorded there and the terms of the settlement reached in January 2014, the Board would have concluded that the history regarding that individual could not alter the conclusion that, prior to the merger, there had been only one full-time and one part-time billing/clerical employee covered by the PS Distribution Collective Agreement as set out in paragraph 27 of the Agreed Statement of Facts.

9. Accordingly, the Board has proceeded on the bases that, following the merger: there were no "office staff" that might have been subject to the single Generation Agreement; Lakeland Distribution had one part-time employee and 19 full-time employees that might have been subject to the single Distribution Agreement; and seven persons in 6.5 positions constituted the "office staff" engaged by Lakeland Distribution.

10. The parties were in agreement that there was a "sale of business" and an intermingling of the relevant employees as contemplated by section 69 of the Act. The facts stipulated to by the parties support their agreement on both points.

Statutory Provisions

11. The provisions of the Act that are relevant to this matter are as follows:

> **58.** (3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.
>
> . . .
>
> **69.** (1) In this section,
>
> "business" includes a part or parts thereof;
>
> "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.
>
> (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.
>
> . . .
>
> (4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,
>
> (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
>
> (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the

predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

(c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and

(d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

. . .

(6) Despite subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and the person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

(a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);

(b) determine whether the employees concerned constitute one or more appropriate bargaining units;

(c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in the unit or units; and

(d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

. . .

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such

evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

The Issue

12. The parties have left for the Board's decision whether the exclusion of "office staff" in the BG Collective Agreement and the LP Collective Agreement is to be continued or discontinued in defining the bargaining units that are to be maintained after the negotiations provided for in their Memorandum.

The Positions of the Parties

13. The responding parties contended that the "office staff" exclusion should be maintained because the overwhelming number of clerical employees – 5 of 6.5 – were non-union and because, for more than 40 years prior to the merger, the clerical employees of Lakeland Power Distribution Ltd. and its predecessor entities had chosen not to be represented by CUPE or its Local 1813. Based on that numerical imbalance against the applicant, the responding parties submitted that it was not necessary or appropriate to require a vote to determine the issue. In the alternative, if the Board were persuaded to order a vote, the position of the responding parties was that the constituency should be limited to the clerical and billing staff (currently numbering 6.5 with the inclusion of one part-time employee) and should not include the other Lakeland employees. The inclusion of those 13 employees in the bargaining unit and their representation by the applicant was not in issue.

14. In so saying, the responding parties argued against "sweeping in" the non-union clerical/billing employees, citing section 2 of the Act and its reference to "trade unions that are the freely-designated representatives of the employees", and also invoking the representational processes inherent in the *Wagner Act* model. The responding parties noted in particular that the clerical component would not constitute a "minor add-on" as the five non-union clerical/billing employees would represent approximately 28% of the bargaining unit if they were included under the collective agreement. As for a vote, the responding parties argued that requiring the clerical/billing employees to vote along with the unionized employees that were not in issue would constitute "gerrymandering" and would bring labour relations into disrepute.

15. The responding parties relied on the following authorities: *Bracebridge Hydro-Electric Commission,* 2000 CanLII 12272 (ON LRB); *Independent Electricity Market Operator v. CUSW,* 2011 ONSC 81 (Div. Ct.), aff'd 2012 ONCA 293, leave to appeal to S.C.C. refused, [2012] SCCA No. 311; *Chatham Kent Hydro Inc.,* [2013] O.L.R.D. No. 57; *Lincoln Hydro Electric Commission,* [1999] O.L.R.D. No. 1264; and *R.W.D.S.U., Local 422 v. Mountainview Dairy Ltd.* [1967] OLRB Rep. Feb. 911.

16. The *Bracebridge Hydro-Electric* decision was noted for its involvement of the applicant and the entity that was subsequently incorporated as the responding parties,

Bracebridge Generation Ltd. and Lakeland Power Distribution Ltd. The Board determined that there should be no interference with the subsisting bargaining structure. Accordingly, CUPE retained bargaining rights with respect to the "outside" unit in the face of the claim by the Power Workers Union ("PWU") that the Board should have ordered a vote. The Board recorded that the CUPE bargaining unit excluded office staff and that there were two employees in those positions before the "sale of business". The Commission had offered employment to a number of members of the PWU. Only one accepted a position in the "outside" group and one office employee accepted the Commission's offer. In the result, the Board found that "there were 10 outside workers represented by CUPE Local 1457, one of whom was formerly represented by PWU, and there were 3 non-union office (inside) workers, one of whom was formerly represented by PWU".

17. In rejecting the PWU's position that there should be a single unit combining the inside and outside workers, the Board noted:

> 15. Moreover, it would be problematic to roll in the existing unorganized office employees with the outside workers just because a sale of business has occurred and Bracebridge has hired an additional 2 employees from the vendor Hydro.

Accordingly, the PWU, with only one former member in a unit of 10, was denied a vote in the "outside" unit; however, as one-third of the three "inside workers" had been represented by the PWU it was awarded a vote to determine whether those workers wished to be represented by the PWU.

18. The responding parties relied on this decision as support for the proposition that the "office staff" affected by these proceedings should not be swept into a bargaining unit without their being given an opportunity to make their wishes known, particularly as they had not opted for trade union representation notwithstanding their employment in an environment in which the applicant and unionization were otherwise so prominent.

19. The Divisional Court decision in *Independent Electricity System* was cited in support of the responding parties' application of a "*Charter* prism" regarding the right of employees to associate and the need to consider their views. Referring to *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia* (2007), 283 D.L.R. (4th) 40 (S.C.C.), the Divisional Court made the point forcefully at para. 65:

> . . . it is important to keep in mind the way in which the Supreme Court of Canada framed the right to freedom of association in *Health Services*. The right is not that of the union. Rather, it is the right of an individual to associate with others to pursue workplace goals through a process of collective bargaining (at para. 3). Sometimes the Supreme Court describes it as a right of employees, sometimes as a right of workers, and sometimes as a right of union

> members. However, it is a right of individuals, not of the union as an institution.

20. Thus, the responding party argued that the policy behind the Act, the recognized freedom of association enjoyed by individuals, and the history of the preservation of the non-union status of the billing/clerical employees of Lakeland Distribution dictated a separate determination with respect to the clerical staff. Moreover, they submitted, as Lakeland Distribution was the dominant party in the merger and as the numerical disparity between the unionized "office staff" (1 or 1.5) and non-union "office staff" (5) was so great, a representation vote was not needed to determine the appropriate outcome.

21. The responding parties referred to two passages in the *Chatham Kent Hydro* decision. In para. 26, the Board quoted extensively from George W. Adams, *Canadian Labour Law* (2d) (2008, Canada Law Book Inc.) at 8.330, including the following:

> The Ontario board has held that the section of the Act dealing with intermingling [ss. 69 (6)] is directed at remedying a situation in which there is a *de facto* overlap or merger of bargaining units, so that it is difficult to preserve bargaining rights as they were prior to intermingling without creating operational problems for successor employers or *prejudicing the established rights of employees*.
>
> (emphasis added)

Then, at para. 27, the Board noted:

> Where there is a "large disparity" in the size of the intermingled groups of employees, the Board will generally not direct that a representation vote be taken. The Board has been reluctant to define a minimum proportion of employees in the intermingled unit that a trade union must represent for a representation vote to be ordered. However, it is rare for the Board to order a vote when one trade union represents 80% of the intermingled unit of employees. (*Silverwood Dairies*, [1980] OLRB Rep. October 1526 at paras. 26-29; *Pembroke General Hospital*, [1997] OLRB Rep. Sept./Oct. 918 at para. 15).

22. The responding parties asserted that the Board should not order a representation vote since almost 80% of the clerical/billing employees of Lakeland Distribution were non-union. Some support for that proposition comes from the *Lincoln Hydro* decision. There, the evidence established that there was only one Ontario Hydro employee, previously-represented by the PWU, who took employment with Lincoln Hydro. The Board determined that it was an appropriate case for the termination of the PWU's bargaining rights without a representation vote, concluding, at para. 143: "Should

the union wish to represent this largely (and historically) unorganized grouping of employees at the now larger Lincoln Hydro, it must apply for certification".

23. To the same effect, the responding parties relied on *Alliance Dairy* for the following observations, at para. 5:

> Where two or more bargaining units are, as the result of a sale and the intermingling of employees, merged into one, as in the instant case, both the need for stability in collective bargaining relationships and plain common sense would require that, where there is a large disparity in the size of the two groups of employees, there would be no representation vote, with its necessary expense, propaganda and disruption, but rather a declaration should be made that the trade union representing the great majority of the employees is to be bargaining agent for the new bargaining unit.

24. The Board also declined to order a vote in *Mountainview Dairy* where the employees in the bargaining unit of the acquired business would account for no more than 25% of employees in the bargaining unit in which intermingling had occurred. The responding parties asserted that the same result should follow with respect to the billing/clerical employees at Lakeland Distribution as only 23% of their number had been represented by CUPE and 77% had been non-union. The responding parties contended that all of those employees should be excluded from the bargaining unit and that, based on their historical acceptance of non-union status, the group had spoken and did not require the taking of a vote.

25. The applicant reiterated its agreement to the facts underlying the Board's jurisdiction to grant a remedy under subsection 69(6) of the Act and urged the Board "to give effect to the bargaining rights of Locals 17 and 1813 [by ordering] a vote of all employees at Lakeland". The applicant contended that, since it represented 77% of all of the employees that might be included in the bargaining unit, it could argue that the non-union staff should simply be rolled into the bargaining unit. Nevertheless, the applicant proposed that a vote be held and that the voting constituency should comprise all employees that would be covered by Local 17-04's scope clause in the collective agreement with PS Distribution.

26. The applicant argued that, in the numerical analysis, the Board should recognize that there were two unionized "office staff" covered by the PS Distribution collective agreement and to be included in the Lakeland Distribution bargaining unit. On that basis, the applicant contended that it represented two or 28% of the seven persons in that position. Thus, while the applicant maintained that it would be entirely inappropriate to consider a specific job class and to "hive off" the billing/clerical employees as a separate group, if that were to be done the rate of unionization was sufficient, on the cases, to preclude the Board's acceding to the request that the exclusion of the "office staff" be determined without a vote.

27. The applicant contended that an all employee unit was most appropriate as it would preserve and not extend Local 17-04's bargaining rights. Moreover, it submitted, a vote of all would be appropriate as all would be subject to the collective agreement with the adoption of Local 17-04's scope clause. Taking a different perspective, the applicant asserted that there has been no case in which the Board has carved out a constituency in an otherwise appropriate bargaining unit to canvas the employees as to whether they wished to be in or out of the unit. Votes, the applicant argued, are "bargaining unit based".

28. The applicant accepted that the Board has jurisdiction to do what the parties asked of it, but it urged the Board to exercise that jurisdiction with restraint.

29. The applicant relied on the following authorities: *Calvert (Township) v Iroquois Falls (Town)*, [1969] OLRB Rep. Feb. 1208; *Bryant Press Limited,* [1972] OLRB Rep. April 301; *City of Peterborough,* [1979] OLRB Rep. February 133; *Bermay Corporation Limited,* [1980] OLRB Rep. February 166; *Ronnie Gee's Sports Palace,* [1991] OLRB Rep. May 689; *PCL Constructors Eastern Inc.,* [1995] OLRB Rep. October 1277; *Antonacci Clothes Inc.,* [1984] OLRB Rep. July 887; and *Bracebridge Hydro-Electric Commission,* 2000 CanLII 12272 and 12271 (ON LRB).

30. The applicant noted the comparability of the numbers in this matter with those dealt with in *Calvert (Township)*. That was a case in which CUPE Local 109 represented 19 employees of the Township of Calvert in an all employee unit. The Township annexed the Town of Iroquois Falls. The Town had five non-union employees and the Board declared CUPE Local 109 to be the bargaining agent of all 24 employees.

31. The applicant cited *Bryant Press* as a case involving a sale of business, intermingling, and the Board's practice of ordering a vote of all of the employees in the bargaining unit. In that case, approximately two-thirds of the intermingled employees had not been represented by a trade union.

32. There was no finding of intermingling in the *City of Peterborough* case; however, the applicant cited the decision for its discussion of other points. The Board there had this to say:

> 13. The consistent point of departure in the decisions of the Board in applications under section 55 [now section 69] of the Act is a recognition that the primary purpose of the section is the preservation of employees' bargaining rights upon the transfer of a business. The section protects employees of a transferred undertaking against automatically losing their union or seeing their bargaining rights transferred to a bargaining agent not of their choosing. Thus while the remedial scope of the section allows the Board to engage in an assessment of what is the appropriate

> bargaining unit the criteria to be applied are not identical to those which obtain in an application for certification of previously unrepresented employees. While the Board may have regard to all the criteria that apply to that determination in certification proceedings it must also, having regard to the purpose of section 55, seek to balance the interests of the employees of the transferred undertaking and their union with the interests of both the employer purchasing the undertaking as well as the interests of that employer's existing employees and their union. In the fashioning or amending of bargaining units under section 55 of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer's administrative structure. (*Oshawa Wholesale Ltd.* [1965] OLRB Rep. Feb. 504; *The Corp. of the City of Kitchener* [1973] OLRB Rep. June 306; *Yarntex Perth, Division of Yarntex Corporation Ltd.* [1975] OLRB Rep. Feb. 137).
>
> 14. A particular concern in the determination of bargaining units under section 55 of The Labour Relations Act is that existing bargaining structures not lightly be interfered with. The Board recognizes the value of a bargaining unit that has developed through a succession of collective agreements. A bargaining structure with some substantial history to it often indicates a sound bargaining relationship. More often than not it has evolved through increased communication and has come to reflect a workable pattern of mutual expectations between union and employer. Since the promotion of sound collective bargaining relationships is what The Labour Relations Act is all about, the Board is understandably reluctant to dismantle a bargaining structure that has withstood the test of time.

33. In *Bermay Corporation*, the Board dealt with a successor employer's contention that the Board should relieve it of the obligation to adhere to the collective agreement after the union had succeeded in winning a representation vote ordered under what is now subsection 69 (8) of the Act. The Board ruled that, in those circumstances, it would declare the collective agreement to be no longer binding on the successor employer "only where there are extraordinary and compelling industrial relations reasons for doing so" (para. 22). The applicant also relied upon paragraph 28 of that decision. There the Board referred to its "authority to assess the merits of industrial relations problems that arise and, where appropriate, make a remedial order tailored to the facts" when there is intermingling following the sale of a business. The applicant noted the Board's stipulations that "vested contractual rights are not lightly to be interfered with", that any employer seeking the termination of a collective agreement "has a heavy onus to discharge", and that ". . . the employer must satisfy the Board that because of the intermingling a continuation of the collective agreement will work immediate and substantial prejudice to the operation of its business". The applicant noted the absence of

any evidence to establish that the continuation of the inclusion of "office staff" as in Local 17-04's scope clause would prejudice the employer's business.

34. *Ronnie Gee's Sports Palace* had no direct bearing on matters in issue here. It did not involve intermingling, but addressed the successor employer's argument that the applicable collective agreement excluded part-time employees. The parties here have agreed to accept the scope clause in the Lakeland Distribution and Bracebridge Generation collective agreements, both of which exclude "persons regularly employed for not more than twenty-four (24) hours per week".

35. The applicant referred the panel to paragraphs 8 and 9 in *PCL Constructors* in which the Board noted the focus of section 69 on the protection of a trade union's bargaining rights from being affected by commercial or corporate activities.

36. While the decision did not involve an intermingling of employees, *Antonacci Clothes* was referred to by the applicant for its reiteration of basic principles in paragraph 24 where the Board made these statements, among others:

> Bargaining rights cover all those who, at any given time, fall within the reach of the bargaining unit definition. An employer's work force may expand or contract, new employees may be hired and old ones depart; while these events may change the number and identity of employees for whom the trade union has bargaining rights, the bargaining rights themselves remain unaffected. While a trade union's right to represent employees in a particular bargaining unit is initially determined by the wishes of the employees in the bargaining unit at the time of the determination, the union's status as exclusive bargaining agent is not continuously exposed to reappraisal of the desires of the employees who may from time to time thereafter find themselves within that bargaining unit.

37. The applicant also referred to the following statement in paragraph 25 of the *Antonacci Clothes* decision as identifying "exactly how CUPE asks the Board to give effect to Local 17's rights in the newly-merged entity":

> When two or more bargaining units are merged by the Board in the exercise of its powers under subsection 63(6) [now subsection 69(6)], a substantial disparity in their relative sizes has been dispositive of the . . . resulting question of representation not only where persons employed by the successor prior to the sale were represented, as in *Alliance Dairy*, but also where one of the intermingled groups was not previously represented: *Town of Iroquois Falls*, [1969] OLRB Feb. 1208. Where disparity in size is not determinative of the issue of representation, the Board has exercised its power under subsection 63(8) [now subsection 69(8)]

to direct a representation vote in order to assist the Board in resolving the issue of representation created by the redefinition of bargaining units.

38. The applicant also cited *Bracebridge Hydro-Electric*, noting that the Board there had found two units to be appropriate, the outside unit that had been represented by CUPE and an "inside" unit for which CUPE had not had bargaining rights under its collective agreement. This was raised as a distinguishing point as the parties in this proceeding had agreed that there was to be only one collective agreement for Lakeland Distribution and the Board in *Bracebridge Hydro-Electric* was not dealing with a "sub-constituency" of a single unit, but a separate bargaining unit (or potential bargaining unit).

39. The applicant asked the Board to follow the practice of applying section 69 to preserve bargaining rights and submitted that a representation vote was in order since, on the cases, a vote would be ordered if the trade union represented 20% to 25% of the affected employees. Here, CUPE asserted that it represented 77% of the people in the appropriate bargaining unit, a single all employee unit, including "office staff", as in Local 17-04's collective agreement with PS Distribution. The constituency proposed by the applicant comprised 9 persons covered by the Local 1813 collective agreement with Lakeland Distribution, 5.5 individuals covered by Local 17-04's agreement with PS Distribution, and 5 billing/clerical employees of Lakeland Distribution, currently not represented.

40. The responding parties replied extensively to the applicant's submissions, first reiterating the view that CUPE's proposal was unprincipled and gerrymandering having regard for the facts that (i) almost 80% of the billing/clerical employees were non-union, (ii) the Lakeland Distribution bargaining unit was not otherwise contested or subject to a vote, (iii) Lakeland Distribution became the employer and was the dominant party in what amounted to a takeover of the Parry Sound operation, and (iv) the historical circumstances confirmed the appropriateness of the Lakeland Distribution scope clause. Ordering a vote as proposed by the applicant where the outcome is known in advance would, in the view of the responding parties, bring labour relations into disrepute.

41. The responding parties asserted that the purpose of section 69 had been recognized and met. Protection had been afforded the applicant's bargaining rights and the responding parties had accepted the collective agreements, with only one issue remaining – the status of the clerical employees. The responding parties argued that because the terms of the numerically superior and dominant party's collective agreement had excluded the "office staff" for years, the Board's discretion under subsection 69(6) ought to be exercised with due attention to the principles of the legislation and its protection of representational rights.

42. Given the acceptance of the Lakeland Distribution scope clause except with respect to the exclusion of "office staff", the responding parties maintained that the actual

count should exclude the part-time employee from the Parry Sound operation with the result that the relevant population of clerical/billing employees was six, with only one originating from the applicant's bargaining unit.

43. On the basis that the scope clause of the dominant party, Lakeland Distribution, should be the appropriate measure, the responding parties contended that the applicant's position went beyond the purview of section 69 in that the proposed inclusion of excluded personnel, "office staff", constituted an attempt to extend rather than to preserve the bargaining rights that the applicant had established at Lakeland Distribution.

44. The responding parties distinguished several of the cases relied upon by the applicant on the bases that there was no intermingling present or that the factual circumstances were otherwise unhelpful to the analysis. Specific reference was made to paragraph 14 of the *City of Peterborough* decision quoted above and the Board's recognition of the significance of a bargaining structure "with some substantial history to it". The responding parties noted that, from their perspective, the applicant sought to overturn the long-established structure at Lakeland Distribution relying on only "one relevant employee".

45. Finally, the responding parties took issue with the applicant's contention that *Bracebridge Hydro-Electric* was "entirely different". To the contrary, they argued, the situation was "entirely the same" in that the Board had there dealt with these parties and had required the PWU to contend with the clerical staff as a separate unit.

Decision

46. The Memorandum records the agreement of the parties to alter the terms of the BG Collective Agreement and the LP Collective Agreement, with the consent of the Board pursuant to subsection 58(3) of the Act, so that both would expire on December 31, 2015 rather than the current date of June 30, 2017. In paragraph 7 of the Memorandum the parties declared that the Memorandum was subject to such consent.

47. Accordingly, the Board directs the parties to file forthwith their joint application so that appropriate notice may be given to the affected employees and this aspect of the matter might be decided.

48. In the circumstances agreed to by the parties, the Board has determined that the employees now engaged in the clerical/billing functions as employees of Lakeland Distribution should be allowed to vote and to do so separately. In that way, those employees will have an opportunity to demonstrate their wishes as to whether those positions will be included in the bargaining units or whether the exclusion of "office staff" shall be retained for the purposes of the collective agreements that are to be negotiated by the parties. The constituency for that vote is to be restricted to the employees now engaged in the clerical/billing functions as employees of Lakeland

Distribution and shall not be open to or include any other members of the bargaining units. The reasons for the Board's decision follow.

49. As noted, the parties agreed that the conditions precedent to the application of subsection 69(6) of the Act had been satisfied, and they reached agreement on all consequential terms other than the treatment of "office staff". Under subsection 69(6) the Board has jurisdiction to choose between various courses of action in those circumstances. The Board could simply declare that Lakeland Distribution is not bound by the PS Distribution Collective Agreement and thereby terminate the union status of two individuals previously employed under that agreement by preferring the LP Collective Agreement. Alternatively, the Board might amend any bargaining unit definition. Here, that definition is settled in all respects other than the inclusion or exclusion of "office staff".

50. The Memorandum contemplated the Board's deciding that issue after a vote or without requiring a vote. The responding parties contended that no vote was required having regard for the disparity in the number of non-union clerical/billing employees and the number of unionized clerical/billing employees. The parties cited authorities on the strength of which the Board could arguably make a determination without directing a representation vote; however, none of the cases cited arose in circumstances that were directly comparable to these and none offered a compelling basis for a decision to proceed without taking a vote of the affected employees.

51. Moreover, the historical fact of the Bracebridge/Lakeland Distribution office staff's declining CUPE representation cannot be determinative. The Board received no evidence of their having been canvassed recently or at all since the vote ordered in the *Bracebridge Hydro Electric* case more than a decade ago.

52. Subsection 69(8) authorizes the Board to "hold such representation votes, as it considers appropriate" before disposing of an application under section 69. The applicant conceded that a vote should be held, but argued that the 13 bargaining unit employees that are not engaged in clerical/billing functions and are not part of any "office staff" should be permitted to vote.

53. The responding parties submitted that, if a vote were held, only the clerical/billing employees should be allowed to vote. The applicant observed in argument that there were no cases in which the Board had ordered a vote as proposed, in the alternative, by the responding parties. It is also noteworthy that the applicant did not identify any decisions in which the Board had ruled that such a course of action was not available.

54. The Board would not consider the result of a vote in the voting constituency proposed by the applicant to be appropriate in the circumstances of this matter. If a vote is to have more than merely symbolic value, it must, at a minimum, present the potential for its contributing meaningfully to the resolution of the issue between these parties.

55. It is extremely difficult to envisage that a vote in which the 13 non-clerical employees in the bargaining unit participate alongside the clerical/billing staff would be effective to do anything other than to rubber stamp the applicant's position before the Board. The votes of the clerical/billing employees must not be diluted to the point that their wishes might have no effect whatsoever on the outcome of the process. The Board is not satisfied that there is any justification for the ordering of a vote that would involve any of the bargaining unit employees that are not engaged in clerical/billing functions. There is simply no dispute or possible dispute regarding the appropriateness of their inclusion in the Lakeland Distribution bargaining unit. A vote involving those employees would serve no useful purpose.

56. The applicant did not suggest that a vote involving the bargaining unit employees that are not engaged in clerical/billing functions should be taken to determine whether they should continue to be included in the bargaining unit. Indeed, the representation vote proposed by the applicant would not address or advance any disclosed interests of that group of employees. In particular, the applicant did not assert that those employees have any interest in the outcome of the dispute regarding the inclusion or exclusion of the clerical/billing employees. The applicant's concession regarding the holding of a vote was clearly strategic, and the applicant offered no explanation – apart from essentially formulaic arguments – for those employees being called upon to vote. Having proposed the taking of a vote, it was not open to the applicant to deny those whose interests and rights are directly affected by these proceedings the right to a meaningful vote.

57. The Board is properly concerned with whether the true wishes of the employees will be determined as a result of a representation vote. Here the question is should the "office staff" be included or excluded or, more pointedly, do those employees wish to be represented by the applicant. Whether other bargaining unit employees wish to confirm their choice of the applicant as their exclusive bargaining agent is simply not in issue; their views and their votes are not relevant.

58. In the *City of Peterborough* decision, the Board observed that it must

> . . . seek to balance the interests of the employees of the transferred undertaking and their union with the interests of both the employer purchasing the undertaking as well as the interests of that employer's existing employees and their union".

The applicant's proposed voting constituency virtually ignores and subordinates the interests of the non-union employees of Lakeland Distribution. There is no evidence to suggest that the interests of those employees are aligned with the applicant and inclusion in a bargaining unit – or that they are not. Quite obviously, the means by which the Board might meet its obligation to establish a balance is to order a vote that will give the

clerical/billing employees, and only those employees, the opportunity to express their choice and identify their interests on this singular issue.

59. The responding parties' argument based on section 2 of the Act and the employees' "freedom of association" as discussed by the Divisional Court in *Independent Electricity System* is compelling. The words of section 2 constitute more than a mere recital; they embody a statement of purpose and as such should inform the approach taken to the interpretation and application of the Act. Moreover, the Act in section 11 expresses the legislative concern for the conduct of votes as a means to determining the "true wishes" of employees when called upon to determine their "freely-designated representatives". Those principles would not be tested or applied with a vote as proposed by the applicant or without a vote as proposed by responding parties.

60. The applicant failed to demonstrate how its proposed voting arrangement respected the freedom of association of the affected employees, their right to freely-designate their exclusive bargaining agent (or to decline to do so), or the ability of the Board to determine the true wishes of the clerical/billing employees. This situation is not comparable to that in *Bermay*. Here, the employer maintains the collective agreement and seeks adherence to a subsisting collective agreement that excludes "office staff". The applicant correctly observed that the responding parties did not assert prejudice adverse to their business interests; however, the responding parties certainly raised the issue of potential prejudice to the rights of employees that have not previously been included in any of the applicant's bargaining units.

61. Given that the outcome of the vote will determine the ultimate bargaining unit definition and given that all of the clerical/billing employees might be affected by the results of the vote, all seven should be allowed to vote.

62. The Board is mindful that the parties agreed to a scope clause that excludes part-time employees; however, there was no evidence that either of the clerical/billing employees covered by the PS Distribution Collective Agreement would be excluded by virtue of that definition. The agreement under which they were employed did not distinguish part-time and full-time employees. Either or both of them might be "part-time", but working more than 24 hours per week. Therefore, the unionized component of the seven clerical/billing employees could be two employees, or 28%. On the cases cited by the parties, that level would justify a vote and the Board has decided that it would not deal with this issue without allowing all of the affected employees an opportunity to vote to determine whether the "office staff" will or will not be included in the bargaining unit represented by the applicant.

63. These circumstances parallel the situation addressed by the Board in *Bracebridge Hydro Electric*. There, the PWU had one of three relevant employees. Here, two of seven relevant employees were employed under a collective agreement. There, the persons in issue, again the inside workers, were put to their election. Those employees were deciding whether there would be a second bargaining unit, an inside

unit; here, the decision is whether the "office staff" will be included in a subsisting bargaining unit. The question is the same in principle: do they or do they not wish to be represented? The determination affects the interests of all seven and all seven should be permitted to vote.

64. Having regard for the foregoing, the Board orders that, if the parties' condition regarding the early termination of the BG Collective Agreement and the LP Collective Agreement is satisfied or withdrawn, a representation vote shall be taken among the employees employed as at the date of this decision in the following voting constituency:

> all office and clerical staff employed by Lakeland Power Distribution Ltd., save and except Supervisor, persons above the rank of Supervisor, co-operative students, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week.

For greater certainty, if he or she remains employed by Lakeland Distribution, the person previously employed by PS Distribution in a part-time capacity shall be permitted to vote notwithstanding the above exclusion of "persons regularly employed for not more than twenty-four (24) hours per week".

65. The date of the vote will be determined forthwith after the parties' condition regarding the early termination of the BG Collective Agreement and the LP Collective Agreement is satisfied or withdrawn.

66. If the vote is held, employees will be asked whether or not they wish to be represented by CUPE in their employment relations with their employer, and the outcome of the vote will determine the issue between the parties regarding the continuation or the elimination of the "office staff" exclusion in the agreed bargaining unit description for each of the single Generation Agreement and the single Distribution Agreement.

67. The responding parties are directed to post copies of this decision for 90 days adjacent to copies of the Application and the Notice to Employees and where they are most likely to come to the attention of the employees affected by the application and this decision.

0318-10-U Labourers' International Union of North America, Local 625, Applicant v. **Pickard Construction**, Responding Party

3527-10-R; 3657-10-R; 3779-10-R; 4020-10-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. 955140 Ontario Inc. o/a

Pickard Construction, Responding Party v. Northern Employees Association, Intervenor

3599-10-U Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. 955140 Ontario Inc. o/a **Pickard Construction,** Northern Employees Association and Maurice Pickard, Responding Parties

Certification – Timeliness – Trade Union – LIUNA applied to displace employees in bargaining units represented by the Northern Employees Association, arguing that the Association was no longer a trade union because the individuals purporting to be on its executive were not conducting themselves in accordance with NEA's constitution and in fact were not even aware of the existence of such a constitution – The Board had to determine whether the NEA was a viable organization of employees formed for purposes of collective bargaining (as had been found by the Board some twenty years earlier when the NEA was first certified as a trade union) – Whether the organization abides by its constitution is only one element for the Board's consideration; the Board is more concerned with the NEA and its officers being completely unaware of the constitution's existence and its foundational significance for the NEA as a trade union – Since the purported officers of the NEA had no knowledge of the constitution (by their own admission) nor what was required of them when they were allegedly acting on behalf of the Association, the Board determined they had no ability to ascertain what terms and conditions governed their relationship with NEA's members or the relationship of the members among themselves – The NEA ceased to exist as a trade union at the time the current application for certification was filed with the Board; the agreement between NEA and the employer was not a collective agreement, therefore there was no collective agreement in operation when the applications were filed – Applications timely; matters referred to Case Management Hearing

BEFORE: *Harry Freedman*, Vice-Chair

APPEARANCES: *Eli Gedalof, Stephen Krashinsky, Yu-Sung Soh, Mark Wilson* and *Jesse Shroyer* for the applicants; *David L. W. Francis* and *Maurice Pickard* for 955140 Ontario Inc. o/a Pickard Construction and Maurice Pickard; *David Cote* and *Rick Dolphin* for Northern Employees Association.

DECISION OF THE BOARD: January 30, 2015

1. The issue being addressed by the parties in these six proceedings (four construction industry certification applications in Board File Nos. 3527-10-R, 3657-10-R, 3779-10-R and 4020-10-R being dealt with under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 as am. (the "Act") and two unfair labour practice applications under section 96 of the Act (Board File Nos. 0318-10-U and 3599-10-U) seeking declaratory and other relief) is whether those four certification applications filed by Labourers' International Union of North America, Ontario Provincial District Council

(the "OPDC") between January and March 2011 are timely. See paragraph 5 of the Board's decision in these matters dated May 12, 2011, *Pickard Construction*, 2011 CanLII 27749.

2. The timeliness issue depends on whether the document that both the Northern Employees Association ("NEA") and 955140 Ontario Inc. o/a Pickard Construction ("Pickard Const.") rely on to claim that those four certification applications are untimely is a collective agreement within the meaning of the Act. The agreement relied on by the NEA and Pickard Const. on its face indicates that it was effective April 1, 2009 and expires April 30, 2012. There is no dispute that if that document is a collective agreement within the meaning of the Act, the four certification applications are untimely and would have to be dismissed.

3. The position taken by the OPDC is that the agreement is not a collective agreement because at the times their certification applications were filed (and for many years before those times) the NEA, even if it had been a trade union within the meaning of the Act as determined by the Board when the NEA was certified by decision dated April 28, 1994, had ceased being a trade union. The OPDC also contends that even if the NEA was a trade union at the time it entered into the April 1, 2009 agreement with Pickard Const., that agreement cannot be a collective agreement within the meaning of section 1(1) of the Act by reason of section 53.

4. The legal issues raised by the OPDC relating to the timeliness of its applications require the Board to examine the definitions of "trade union" and "collective agreement" in the Act, and whether the NEA, after having been found to be a trade union in 1994, had ceased to exist as a trade union before the first of these applications was filed in January 2011, or before April 1, 2009. In addition, if the Board does find that the NEA was a trade union on and after April 1, 2009, then it will be necessary to determine whether Pickard Const. participated in its formation or in its administration, or contributed financial or other support to the NEA.

5. The Board heard evidence from a number of witnesses over many days of hearings, received several volumes of documents and final arguments that alone consumed four days of hearing. Much of the testimony was contradictory, there were material gaps in the documentary evidence relating to the financial records of the NEA, particularly in respect of the period around the time it retained counsel and applied for certification, and it was clear that some witnesses were either confused or could not explain some of the discrepancies relating to the entering into and the term of operation of agreements between NEA and Pickard Const.

6. Nevertheless, the testimony and documentary evidence filed in respect of the manner in which the NEA conducted itself in recent years prior to the OPDC seeking certification were in some respects relatively consistent, although the parties disagreed over the legal consequences arising from the material facts over which there was little dispute.

7. At the time NEA was certified as the bargaining agent for employees of Pickard Const. in April, 1994 the Board determined based on the material filed by the NEA that it was a trade union within the meaning of the Act. That material included a constitution that was adopted by employees at a founding meeting, minutes of that founding meeting and membership evidence signed by the employees by which they became members of the NEA. All that material was prepared and filed by counsel for the NEA at the time the NEA applied for certification, together with written submissions from its counsel setting out the steps the NEA had taken to constitute itself as a trade union within the meaning of the Act. It was on the basis of that written material that the Board in its decision of April 28, 1994 (*Pickard Construction*, [1994] OLRD No. 1555) wrote after noting that the NEA had not been previously found to be a trade union under the Act: "Having regard to the material which has been filed with the Board by counsel for the applicant [the NEA], the Board finds that the applicant is a trade union within the meaning of section 1(1) of the Act."

8. The OPDC in these proceedings does not seek to challenge the Board's earlier determination made in 1994. The OPDC also recognizes that section 113 of the Act means that it must satisfy the Board that the NEA is not a trade union. It is not up to either the NEA or Pickard Const. to prove that the NEA is a trade union within the meaning of the Act. Section 113 provides:

> Where in any proceeding under this Act the Board has found or finds that an organization of employees is a trade union within the meaning of subsection 1(1), such finding is proof, in the absence of evidence to the contrary, in any subsequent proceeding under this Act that the organization of employees is a trade union for the purposes of this Act.

Simply put, the Board must conclude that the NEA is a trade union within the meaning of the Act "in the absence of evidence to the contrary".

9. The OPDC maintains that there is ample evidence "to the contrary" that in its submission must lead the Board to conclude that even if the NEA was a trade union at some time in the past, it was no longer a trade union when it purported to enter into an agreement with Pickard Const. in April, 2009 or, perhaps more importantly, when the OPDC filed its first certification application in January 2011. In essence, the OPDC maintains that the individuals who purported to be officials of the NEA and purported to act on its behalf at the time the relevant agreement was reached with Pickard Const. and subsequently, having never been aware of the NEA constitution or the processes that were in place for the election or appointment of them as officers, cannot assert that the NEA continues to exist since they in fact know nothing about its existence.

10. The OPDC points out that the uncontradicted evidence of the witnesses called not only by it, but by the NEA made it perfectly clear that the purported officers of the

NEA throughout the times material to these applications had no idea that there was a constitution governing the NEA. They had never seen the constitution, never purported to follow the processes set out in the NEA constitution for convening meetings, issuing notices to members, electing the executive, and in conducting its affairs. They became officers of the NEA by volunteering to do so. They had no idea what obligations existed under the constitution of the NEA to give notice of meetings or how many members of the NEA were required to constitute a quorum for it to carry on its business. Indeed, the evidence clearly established that the individuals who purported to be officers of the NEA only learned of the existence of the NEA constitution when the OPDC secured the original certification file from the Board and produced the documents from that 1994 certification file in this proceeding.

11. Pickard Const. and the NEA do not disagree with the OPDC's assertions that the executive of the NEA at the times material to these applications had not strictly complied with the procedures established by its constitution. They say, however, even if the NEA did not follow its constitution when carrying on its activities as Pickard Const.'s employees' certified bargaining agent, the NEA was and remained throughout its existence an organization of employees formed for purposes of representing employees in collective bargaining and therefore was a trade union for purposes of the Act.

12. Both Pickard Const. and NEA maintain that a trade union is more than its constitution—after the NEA was certified it functioned as an organization that represented employees. The fact that some fifteen years after it was certified the officers of the NEA were not aware of its constitution does not, in their submission, affect its status as a trade union. The NEA and Pickard Const. both acknowledge that the NEA was run by a small group of people who, as employees of Pickard Const., were required to be members of the NEA. The individuals who constituted the executive of the NEA from time to time and exercised the authority of the NEA to represent Pickard Const.'s employees continued to act as a trade union despite not complying with the processes of the NEA constitution.

13. The NEA and Pickard Const. submit that any failure on the part of the officers of the NEA to comply with its constitution is really a matter of internal trade union affairs and is not something with which the Board ought to concern itself. They say the Board cannot delve into the internal processes of a certified trade union to ascertain whether at any particular point in time the individuals who are running the union have complied with its constitution. Surely a trade union cannot be at risk of having the Board find that it is no longer a trade union because formalities for convening meetings and electing officers have not been followed, they argue.

14. The principal thrust of the submissions made by the NEA and Pickard Const. with respect to this issue is that the Board ought not to involve itself in the internal affairs of a trade union when no one within the trade union has expressed any concerns about it. They say it is not the role of the Board to police how a trade union discharges its responsibilities under its constitution. Perhaps more importantly they contend that the

Board ought not to examine whether an organization that was found to be a trade union has governed itself in accordance with its constitution, which they accept is the foundation of the organization, but which they also say is not the only element that makes it an organization of employees. They argue that although the NEA may not have called meetings and conducted elections in the manner prescribed by its constitution, it did carry out activity such as collective bargaining when it signed collective agreements and from time to time convened meetings of employees.

15. In the absence of any complaint from a member about the manner in which the NEA operated prior to the OPDC seeking certification, Pickard Const. and the NEA argue that the Board ought not to countenance an attack on the NEA's existence that is based on whether the processes under its constitution were followed by a rival trade union that seeks to displace it as the employees' exclusive bargaining agent. They argue the OPDC's focus on the constitution of the NEA and the failure of the officers of the NEA to pay heed to it does not warrant the Board concluding that at the times material to these applications the NEA was not a trade union within the meaning of the Act.

16. The starting point for the determination of the first issue raised by the OPDC is the definition of trade union in section 1(1) of the Act. The Act provides that a trade union is "an organization of employees formed for purposes that include the regulation of relations between employees and employers…." In my view, the critical element of that definition for purposes of determining the issue raised by the OPDC is the term "organization". There can be no doubt that the NEA was an "organization of employees" before and at the time it was certified by the Board. The question raised by the OPDC is whether the NEA was "an organization of employees" in 2009 and subsequently, or to put it another way, was the NEA an organization of employees when the individuals who were viewed as officers of the NEA purported to act on its behalf in and after 2009?

17. It seems to me that both Pickard Const. and the NEA base their assertion that the NEA remains a trade union within the meaning of the Act because no one took issue with the manner in which it carried on its activity or conducted its business. They also minimize the consequences of its purported officers not only not abiding by the NEA constitution, but having no knowledge whatsoever of its existence or having any concern about what was required of them as officers of the NEA by its constitution.

18. A trade union exists as an entity under the Act that is separate from its members and its officers. In order for an entity to be a trade union for purposes of the Act it must, at a minimum, have a written constitution so that its members know what their respective rights and responsibilities are and so that the individuals who become its officers are aware of their rights and obligations and are in a position to be held accountable for their actions or inaction by their members. That concept is succinctly set out in *Ramada Inn Windsor*, [1997] OLRB Rep. March/April 251 at pages 255-56:

> A trade union has obligations to its members apart from its obligation to act on their behalf in dealing with an employer. It

> may also acquire obligations on behalf of non-members. A union is an independent organization with rights and responsibilities as between the members and the organization as a whole. As the Board has said in a number of cases, the constitution is the document from which those rights and responsibilities arise and are determined. In addition, the acquisition of bargaining rights on behalf of a group of employees entails serious and substantial statutory responsibilities.

The Board in that case assessed whether the organization seeking certification was a trade union and determined that despite its failure to follow its constitution it nevertheless was a trade union within the meaning of the Act when the Board wrote at page 256:

> I have considered the seeming contradiction that there can be an organization because it has a constitution which can continue to exist even while it ignores its constitution. Still, while I have been troubled by the applicant's seeming disregard for its own enabling constitution, those are matters for the members' concern, should they be so inclined. I am ultimately driven to the conclusion that the applicant is a trade union.

19. The Board's focus in assessing whether an entity claiming to be a trade union is a trade union within the meaning of the Act depends on whether it is a viable organization that has the ability to carry out the duties and responsibilities of a trade union under the Act. Simply put, whether the organization is a trade union within the meaning of the Act requires the Board to assess whether it is "an organization of employees formed for purposes" of collective bargaining. See the concurring opinion of Arnup J.A. in *CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498. Whether the organization abides by the processes established by its constitution is relevant to that determination but that is not the only consideration. For example, in *The Gold Crest Products Limited*, [1973] OLRB Rep. Aug. 436 the Board stated at page 437:

> The Board is primarily concerned with the constitution as a source of evidence of the existence of a viable organization and of evidence of the purpose and intent of the organization concerned so that the Board may be able to answer the question "Is the applicant a trade union as defined by the Act" (*Re C.A.S.O. National (Inc.) and Oakville Trafalgar Memorial Hospital Association,* 1972 O.R. Vol. 2, 498)". Inquiries made as to the election of officers are made with a view only to aiding in the decision as to whether the organization is viable. In the present case, there is an arguable point as to whether the appointment of the temporary committee lies within the

> constitutional powers of what must be said to be a general meeting of the membership. It is quite clear, however, that the temporary committee is actively engaged in the activities of the organization carried on to date. The matter of the constitutionality of its appointment and actions is one of internal organization of concern to the membership, none of whom, insofar as the Board was advised, have challenged the propriety of the action.

20. A similar approach was taken in *Caterair Chateau Canada Ltd.*, [1994] OLRB Rep. Apr. 365 where the Board determined that the organization seeking certification was a trade union within the meaning of the Act despite not strictly complying with its constitution when it was created. The Board wrote at pages 368-69:

> It is important to note that the Board is far less concerned with the minute issues of constitutionality of the actions of an organization seeking trade union status than with determining its organizational viability and its ability to carry out the statutory obligations placed upon trade unions by the Act. In this respect, the Board is concerned with the constitution only as evidence of the existence of a viable organization and, therefore whether it is a trade union under the Act. … For this reason, in *Gold Crest, supra*, the Board was satisfied as to the trade union status of an organization that had, in clear contravention of the terms of its constitution, elected an interim executive, when it was otherwise an viable organization. The Board declined to enter into an inquiry with respect to the constitutionality of the actions of the interim executive, noting that the constitutionality of the appointment process was an issue which is of concern to the membership of the trade union, not of the Board. We are in full agreement with the policy expressed in *Gold Crest, supra*, and find it of particular relevance to the present application. The present applicant has, under circumstances where only a fraction of its potential membership was present to vote, adopted the entirely reasonable procedure of deferring a full election of officers until certification. Whatever the constitutionality of that appointment process might be, we are satisfied that the appropriate officers are in place to effect the purposes of the organization which include the carrying out of a trade union's responsibilities under the Act. Accordingly, we are not persuaded that the interim basis of the appointment of the executive constitutes an impediment to the applicant's trade union status.

21. In assessing whether a group of people is an organization of employees that has purported to constitute itself as a trade union the Board is less concerned with the formalities of how the organization has been formed and conducted itself and more concerned with whether it is in fact a viable organization that represents employees. The issue in this case is somewhat different. The Board must determine whether the NEA, having once been found to be a viable organization remained, in fact, a viable organization of employees or, in other words, a "trade union" within the meaning of the Act at the times material to this application.

22. It is apparent from the undisputed facts that the NEA had evolved from the time it was certified as a trade union in 1995 to the period of time when the OPDC applied for certification and Pickard Const. raised its agreement with the NEA as a bar to those applications.

23. On the undisputed facts the persons who purported to be officials of the NEA had no knowledge of the NEA constitution, had never acted in accordance with that constitution and had never taken any steps to determine what the NEA was. It was clear from the evidence called by both Pickard Const. and the NEA that the purported officers of the NEA acted in a way that they believed was the right way to represent the employees of Pickard Const. but they had no idea what basic rules were in place to govern their conduct.

24. It is in my view quite telling that none of the individuals who purported to be officers of the NEA and responsible for carrying out the duties and responsibilities of the NEA were even aware of the existence of the NEA constitution or that the employees of Pickard Const., all of whom had NEA dues deducted from their pay, had the right as members of the NEA to require adherence to its constitution.

25. While Pickard Const. and the NEA suggest that the failure to adhere to the NEA constitution is a mere formality that ought not to determine whether NEA continued to be a viable organization, the Board is not as concerned about compliance with the NEA constitution as it is with the NEA and its officers being completely unaware of its existence and perhaps even more importantly not having any appreciation of its importance as the legal foundation for the existence of the NEA as a trade union.

26. The Board focusses on the existence of a constitution and the manner in which an organization has been formed when that organization claims it is a trade union and seeks certification from the Board by reason of the definition of a trade union in section 1(1) of the Act. See for example *Local 199 UAW Building Corporation*, [1977] OLRB Rep. July 472. The importance of an organization's constitution in assessing whether that organization is a trade union was discussed by the Board in *L'Abbe Construction (Ontario) Ltd.*, [1987] OLRB Rep. Oct. 1191; 87 CLLC ¶16,061 at pages 1192-93:

> 3. ... In determining whether or not an organization of employees constitutes a trade union within the meaning of the

Labour Relations Act, the Board must not impose any requirements, structural or otherwise, which do not have their basis in the Act *(Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498 (Ont. C.A.)). Consequently, except as required by the Act, the Board does not inquire into the structure or internal operation of a trade union.

4. Except as recognized by, and for the purposes of labour relations legislation, like the *Labour Relations Act,* a trade union is not an entity known to law. Apart from its special status under the Act or other legislation, a trade union is essentially a club or voluntary association (for our purposes those terms are interchangeable) which has no existence in law separate and apart from its members. Even under the Act, a trade union is no more than a group of employees who have agreed, each with every other, to join or associate together for purposes which include the promotion of certain common objectives in their employment relations with their employer for their collective benefit. The terms and conditions of the agreement that binds these employees together, and which creates the organization, constitute a contract. Because a trade union has no existence in law separate and apart from that of its members and because a trade union has no right to contract except as provided by legislation, this contract of association is not one between members and the trade union. Instead, it is a complex of contracts between each member and every other member of the organization. This contract, which section 84 [now section 91] of the Act contemplates will be in writing, is commonly called a "constitution" (see *Astgen et al. v. Smith et al.*, [1970] 1 O.R. 129 (Ont. C.A.)). Although the requirement that a trade union be an "organization" implies that it must have some structure, and the nature of the rights, obligations and duties that the Act provides trade unions with implies that there are certain characteristics that it must have, neither the Act, nor anything else, specifies how an organization must be structured or operated in order to be a trade union within the meaning of the Act.

5. Once found to be a trade union within the meaning of the *Labour Relations Act,* section 105 [now section 113] of the Act establishes a rebuttable presumption that that organization of employees is a trade union for the purposes of any subsequent proceedings before the Board. However, an organization of employees can cease to be a trade union and, if it does, its

> bargaining rights and any collective agreement to which it is a party will also cease to exist as such (see *L.M.L. Foods Inc.*, [1985] OLRB Rep. Aug. 1252). Accordingly, it is of fundamental importance that the contractual relationship between members as set out in a trade union's constitution, once created, be maintained. Substantial and persistent failure to abide by its constitution may be evidence that an organization has dissipated or abandoned its constitution, or that its members have ceased to be governed by the constitution that previously made it a "trade union" in such a way that it no longer is one (see *Center Tool & Mold Company Limited* [1985] OLRB Rep. May 633; *Footwear Fashions Limited,* [1981] OLRB Rep. April 454).

In my view the importance of the organization's constitution to assessing whether that organization is a trade union within the meaning of the Act is underwritten by section 91 of the Act, referred to by the Board in *L'Abbe Construction (Ontario) Ltd.*, which provides:

> The Board may direct a trade union…to file with the Board within the time prescribed in the direction a copy of its constitution and by-laws and a statutory declaration of its president or secretary setting forth the names and addresses of its officers.

A union's constitution must be in writing and must be available to its members on request since that document governs the terms and conditions of the relationships among the members with one another.

27. It is in my view abundantly clear that the purported officers of the NEA at the times material to these applications, having no knowledge of the NEA constitution nor what was required of them when they purported to act on its behalf, had no ability to ascertain what terms and conditions governed their relationship with the NEA members or what were the terms and conditions of the relationships of the NEA members among themselves.

28. The Board in *L'Abbe Construction (Ontario) Ltd.* made the following observation at page 1195:

> Consequently, although the Canadian Construction Union's adherence to its constitution has been less than exemplary, it cannot be said that it has entirely abandoned its constitution or that it has ceased to operate as a trade union.

It is clear that the Board looked at two discrete but related elements to ascertain whether an organization that had been certified as a trade union is no longer a trade union—has the organization "abandoned its constitution" or has it "ceased to operate as a trade union".

29. In *L'Abbe Construction (Ontario) Ltd.* the Canadian Construction Union acted like a trade union and there was no suggestion that the individuals who were its executive officers, while not acting strictly in accordance with its constitution, were not aware that it existed.

30. In my view, the complete absence of any attempt by the NEA and its purported officers to follow some form of recognized procedure in conducting its affairs is much more than a failure to comply strictly with its constitution. The individuals who were purporting to exercise the authority of NEA in the recent period prior to the signing of the document that is relied upon by it and Pickard Const. as a bar to the certification applications in issue in this proceeding and during the period up to the time these applications were filed acted much more like an informal employee committee dealing with matters on an *ad hoc* basis rather than as officers of a trade union by having regard to any kind of a formal process for conducting the business of the NEA.

31. The undisputed evidence relating to the NEA and the manner in which it carried on its affairs during the period immediately prior to April 1, 2009 and up to the filing of the applications for certification made it clear that the NEA constitution had no bearing whatsoever on how the NEA operated. It seems to me that the following comment of the Board in *Center Tool & Mold Company Limited*, [1985] OLRB Rep. May 633 at 641 is applicable to this case:

> Evidence that an organization once adopted a written constitution is some evidence that the organization was then a trade union but, like a past Board finding to that effect, it raises only a rebuttable inference that the organization has remained a trade union. The totality of the evidence may show that an organization has dissipated or abandoned its constitution, or simply ceased to have any awareness of or to be governed by whatever constitution may have lead to an original finding that it was a trade union: *Allbright Platers Limited,* [1972] OLRB Rep. Aug. 784; *Tridon Limited,* [1974] OLRB Rep. Jan. 16; *Footwear Fashions Limited,* [1981] OLRB Rep. Apr. 454.

There can be no doubt whatsoever based only on the evidence adduced by the NEA and Pickard Const. that the NEA in 2009 and subsequently, up to the time the applicants in this proceeding secured a copy of the NEA constitution from the Board's file relating to the decision by which the NEA was certified and showed it to the individuals who purported to be on the NEA executive, that the NEA "simply ceased to have any

awareness of or to be governed by whatever constitution" was used to establish that it was a trade union when it was certified by the Board in April 1994.

32. It is simply not sufficient for an organization, once having been certified as a trade union, to claim that it continues to be a trade union because it has a bank account, received dues from employees that had been deducted and remitted by their employer and from time to time signed agreements with an employer. See *Footwear Fashions Limited,* [1981] OLRB Rep. Apr. 454. I accept the submission of Pickard Const. and the NEA that a trade union is more than its constitution. Nevertheless the foundation on which the existence of that trade union rests is its constitution. The Board is not concerned with whether every element of the NEA constitution was followed by the NEA and its officers. Rather, it is the NEA's ignorance of the existence of its constitution and the assumption that the fundamental rules establishing the NEA which ought to govern how it carries on its affairs are irrelevant to the individuals who are charged with acting on its behalf in its relations with Pickard Const. and with the employees it had been certified to represent that drives the Board to the conclusion that although the NEA was once a trade union, it ceased to exist as a trade union at the time these applications for certification were filed with the Board.

33. In the result the OPDC has demonstrated and the Board is satisfied, based on the evidence adduced at the hearings of this matter, that the NEA had ceased to exist as a trade union within the meaning of the Act at some point prior to the time the OPDC had filed the applications for certification in issue in this proceeding.

34. Section 1(1) of the Act defines a collective agreement as:

> ...an agreement in writing between an employer... on the one hand, and a trade union that...represents employees of the employer...on the other hand, containing provisions respecting terms or conditions of employment....

Simply put, in order for a written agreement to be a collective agreement within the meaning of the Act it must be between an employer and a trade union.

35. In view of the Board's determination finding that the NEA was not a trade union when these applications for certification were filed, the agreement between the NEA and Pickard Const. was not a collective agreement. In the result, these applications were filed at a time when there was no collective agreement in operation. They are therefore timely applications for certification.

36. The parties agreed that if the Board determined the four certification applications were timely, they should be referred to a Case Management Hearing to determine what issues, if any, remain in dispute in relation to those four certification applications.

37. The Board in its May 12th decision in these matters wrote at paragraphs 5 and 7:

> 5. These six applications are to be listed together for continuation. The parties agreed the timeliness of the applications for certification in Board File Nos. 3527-10-R, 3657-10-R, 3779-10-R and 4020-10-R is first issue the parties are to address and that issue will be heard together with the allegations in Board File Nos. 0318-10-U and 3599-10-U relating to whether 955140 Ontario Inc. o/a Pickard Construction ("Pickard Construction") participated in the formation or administration of the Northern Employees Association (the "NEA") or whether Pickard Construction contributed financial or other support to the NEA.
>
> 7. The parties agreed the Board will receive the parties' evidence relevant to the timeliness issue only and that such evidence, if it is also relevant to the remaining issues in the section 96 proceedings will be applied to those issues. The parties will not be permitted in this phase of the proceeding to adduce evidence that is not relevant to the timeliness issue even if such evidence would be relevant to the other issues in the section 96 applications. The remaining issues raised in these proceedings will be dealt with, if necessary, following the Board's determination of the timeliness issue. The panel of the Board hearing the timeliness issue shall remain seized with the remaining issues and shall apply the evidence it hears in relation to the timeliness issue that is relevant to the remaining issues to the determination of those other issues.

38. Although the Board in this decision has determined that the NEA is not a trade union within the meaning of the Act, this decision does not determine whether the NEA continues to have standing to participate in these four certification applications either on its own behalf or on behalf of one or more employees in the bargaining units that are the subject of those certification applications. In any event, the NEA is a responding party in Board File No. 3599-10-U and therefore, subject to any further submissions the parties may wish to make at the Case Management Hearing, continues to have standing in this proceeding.

39. The Board directs the applicants to advise the Board, Pickard Const. and the NEA within two weeks of the date of this decision what issues remain outstanding in these six applications. The Board directs Pickard Const. and the NEA to advise each other, the applicants and the Board within one week of its receipt of the applicants' letter of their respective positions on the unresolved issues described by the applicants and whether there are any other issues they wish to raise.

40. These six applications are referred to the Registrar to be listed for a Case Management Hearing in consultation with the parties.

41. In accordance with the Board's May 11th decision, this panel of the Board remains seized with these matters.

42. The Board directs Pickard Const. to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining units affected by the four certification applications herein. These copies must remain posted for a period of 45 business days.

2848-14-IO United Brotherhood of Retail, Food & Industrial & Service Trades, Applicant v **Primeline Windows and Doors Inc.**, Responding Party

Certification – Interim Relief – Unfair Labour Practice – UBRFIST sought interim reinstatement and compensation for a number of employees allegedly discharged during a certification campaign – The Board held that determining whether interim relief can address potential irreparable harm required the Board to undertake an exercise of informed prediction – If the employer's adverse actions are ultimately found to have been improper, then the economic losses of the direct victims of those actions can be redressed with monetary compensation, but the other remedies ordered may come too late to reverse damage caused to the union's and other employees' interests – Primeline laid off eight employees, five of whom were key union supporters; a sixth employee, also a union supporter, was among the eight even though he was on a self-imposed extended leave – The union's application for certification was not accompanied by an appearance of support from 40% of the proposed bargaining unit, so there is no prospect of the Board ordering a representation vote before the ULP is fully adjudicated – At that point, a vote will only be possible if the Board concludes that Primeline contravened the Act in such a manner that the union was unable to meet the 40% threshold as of the date of application for certification – Primeline was unable to persuade the Board that its selection of employees for lay- off was unrelated to their exercise of rights under the Act – Orders for interim reinstatement

BEFORE: *Owen V. Gray*, Vice-Chair

APPEARANCES: *Robert Church, Dante Spadacini, Gerry Cadden, Daniel Green, Norbert Okoli, Luong Q. Quang, Vinh Van Ly* and *Cuong C. Thieu* appearing for the applicant; *Lorenzo Lisi, Fiona Brown, Meghan Cowan, Jesse Medeiros, Tina Mingone, Raymond Lin* and *John Kokkinos* appearing for the responding party.

DECISION OF THE BOARD: January 26, 2015

1. This is an application for an interim order pursuant to the provisions of section 98 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). It was delivered to the responding party and filed with the Board on December 19, 2014, together with a companion unfair labour practice complaint under section 96 of the Act (Board File No. 2847-14-U, hereafter "the Complaint").

2. The responding party ("Primeline") manufactures windows and doors at a plant in Toronto. The focus of this application and the companion Complaint is on Primeline's layoff of certain of its employees on or about November 10, 2014. The applicant union alleges that five employees laid off on that date were its key supporters in a campaign to organize that plant. While the layoffs were purportedly temporary, the union alleges that they were in substance unlawful terminations motivated by the five employees' participation in or support of the union's organizing campaign.

3. In its Complaint the union seeks a declaration that Primeline breached the Act, reinstatement and compensation of the five employees, and other relief. In this application the union initially sought an interim order requiring the reinstatement and compensation of those five employees pending the outcome of the Complaint. The five laid off employees identified in the Complaint and the application are Quoc-Quang Luong ("Luong"), Raymond Chow ("Chow"), Van Vihn Ly ("Ly"), David Truong ("Truong") and Chi-Cuong Theiu ("Theiu").

4. In the Response it delivered on December 24, 2014, Primeline took the position that those five employees and four others had been selected for temporary layoff on a rational basis before it became aware of any organizing activity, that there had been no breach of the Act and that the interim order sought should not be granted. The Response identified Norbert Okoli ("Okoli") as one of the four other laid off employees.

5. Okoli is identified in the Application and Complaint as the Primeline employee through whom the union had begun organizing the plant in July or August 2014, and who had been actively soliciting support on its behalf until late September, when he voluntarily left work for an indefinite period. The Union sought to amend its claim for relief to add Okoli to the list of employees for whom it was seeking reinstatement, alleging that neither it nor Okoli had been aware of his purported layoff until December 21, 2014, when Okoli had found Primeline's notice of it in the mail.[1]

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[1] In his declaration of December 17, 2014, Okoli states that on November 14, 2014, a production employee named "George" had called his cell phone and told him that he had been asked by a Primeline manager to get Okoli's address so that Primeline could send him something in the mail. Okoli declared that he gave George an address, but had not since received any mail from Primeline. From answers Okoli gave during the consultation in this matter, it appears that the address he gave was that of a house in Niagara Falls at which, prior to his departure, he had lived downstairs while another individual lived upstairs. He had not been at that address when he gave it to George, nor at any time from then until December 21, 2014, and between those times he had not asked the remaining occupant of the house whether anything had arrived for him in the single mailbox at that house.

6. Primeline objected to the proposed amendment to the union's claim for relief. I allowed it, as Primeline had already had notice from the Application and Complaint, and the declarations that accompanied the Application, of the allegations of fact on which the remedial claim was based, had already responded to those with an explanation for its having selected Okoli for layoff, and had not suggested that there was any further investigation or pleading necessary in order to respond to a remedial request arising out of those allegations.

7. On December 23, 2014, the union delivered and filed an application for certification as bargaining agent for a unit of employees at Primeline's plant. That application (Board File No. 2888-14-R) was accompanied by membership evidence that, as the application acknowledged, was numerically insufficient to allow the Board to order a representation vote under section 8 of the Act. The application was accompanied by a letter stating that the applicant union would be asking for certification without a vote pursuant to section 11 of the Act, either on the basis of the allegations in the Complaint and this application. In the alternative, it asked that a vote be conducted only after the interim order sought in this application is granted.

8. On December 30, 2014, the Union delivered further allegations in "Reply," together with Reply declarations by most of the individuals whose earlier declarations had accompanied the application.

Section 98

9. Section 98 of the Act provides, in pertinent part, as follows:

> 98. (1) On application in a pending proceeding, the Board may,
>
> (a) make interim orders concerning procedural matters on such terms as it considers appropriate;
>
> (b) subject to subsections (2) and (3), make interim orders requiring an employer to reinstate an employee in employment on such terms as it considers appropriate; and
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> (c) subject to subsections (2) and (3), make interim orders respecting the terms and conditions of employment of an employee whose employment has not been terminated but whose terms and conditions of employment have been altered or who has been subject to reprisal, penalty or discipline by the employer.
>
> (2) The Board may exercise its power under clause (1) (b) or (c) only if the Board determines that all of the following conditions are met:

> 1. The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway.
>
> 2. There is a serious issue to be decided in the pending proceeding.
>
> 3. The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives.
>
> 4. The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.
>
> (3) The Board shall not exercise its powers under clause (1) (b) or (c) if it appears to the Board that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was unrelated to the exercise of rights under the Act by an employee.
>
> (4) Despite subsection 96 (5), in an application under this section, the burden of proof lies on the applicant.

Process

10. It is evident from the language of section 98 that an "interim order" is one that is made, if at all, "pending a decision on the merits in the pending proceeding" – that is, without first hearing evidence and argument about whether a claim for such an order should be granted on its merits. If the merits could be heard and determined as expeditiously as an application for an interim order, then there would be no need for the latter. As a practical matter, adjudicating an application for an interim order must involve an assessment from a labour relations perspective of the considerations identified in section 98 by reference primarily to the allegations of fact in the pending proceedings and the declarations filed with the application, not through resolution of those issues on their merits.

11. In applications of this sort the Board requires that the applicant file with the Board and deliver to the opposite party a full written statement of the allegations of fact and submissions on which it relies in support of its application, together with written declarations by individuals who attest from personal knowledge to those alleged facts. The responding party is then required to do likewise, and in very short order. The Board schedules a "consultation" for an early date, at which the parties attend with their declarants to assist the Board in making its assessment, by providing such submissions and answering such questions as the Board may ask or permit. The consultation is not a hearing on the merits of the pending proceedings.

12. This application was the subject of a consultation at which I advised those in attendance of the nature of the process. I emphasized that I would not be engaged in resolving disputes of fact on which the pending proceedings – the Complaint and the claim for section 11 relief in the certification application – might ultimately turn. I noted that in matters of this kind what the parties' pleadings and declarations do not say may become as significant to the analysis as what they do say, and that this may inform the Board's judgment about whether and to what extent it will ask or permit questions of parties or their declarants at the consultation. I did ask some questions about the mailing to and receipt by Mr. Okoli of Primeline's notice of layoff,[2] and about the number of membership cards collected and the times when those cards were collected. At a suitable point in the consultation I asked counsel whether there were any other questions they felt I should ask or permit them to ask. There being none, the declarants were released before I engaged further with counsel about the matters to be considered.

13. The union's Application and Primeline's Response comprise many pages of pleadings and declarations. The union also filed a "Reply" to the Response, with further declarations by many of those whose declarations had accompanied its initial Application. In the course of the consultation I sustained an objection by Primeline that some of the contents of the union's Reply and supporting reply declarations introduced allegations of fact that could have been made in the initial declarations and were not particularly responsive to any factual issue first introduced by Primeline's Response. I have not given those particular allegations any weight in my analysis. With that exception, I have considered all of the pleadings and declarations. I will not recite here all of the numerous and often disputed allegations of fact in those materials. Allegations particularly germane to my analysis will be identified, as necessary, in the reasons that follow.

14. During the consultation counsel for the union referred to *Cornerstone Structural Restoration Inc.*, [2008] OLRB Rep November/December 760, 2008 CanLII 69884 (ON LRB), *Intercon Security Limited*, [1994] OLRD No. 3275, *Loeb Highland*, [1993] OLRB Rep March 197, *Patrolman Security Services Inc.*, 2005 CanLII 38038 (ON LRB), *Value Village Stores Inc.*, 2006 CanLII 41986 (ON LRB), *International Brotherhood of Electrical Workers*, 1996 CanLII 11186 (ON LRB) and *Federal Force Protection Agency*, 2014 CanLII 50990 (ON LRB), CarswellOnt 12032, 247 CLRBR (2d) 244 and *European Quality Meats and Sausages*, 2011 CanLII 63547 (ON LRB). Counsel for Primeline referred to *K2 Electrical Contracting Ltd.*, 2006 CanLII 21250 (ON LRB) , [2006] OLRD No 2342, *James Dick Construction Ltd.*, 2012 CanLII 46970 (ON LRB), 2012 CarswellOnt 10025, *Namvar v. R.W.D.S.U.,* 1993 CarswellOnt 1427 (OLRB), *MJ Manufacturing*, 2010 CanLII 29725 (ON LRB), *Novotel Canada Inc.*, 2010 CanLII 21183 (ON LRB, *Patrolman Security Services Inc., supra, UPS Supply Chain Solutions Inc.*, 2005 CanLII 34270 (ON LRB), [2005] OLRD No 3737, *Value Village Stores Inc., supra*, and *Wallaceburg Preferred Partners Corp.*, 2007 CanLII 10659 (ON

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[2] See footnote 1.

LRB). I have reviewed all of those decisions, but will not refer to them here except as necessary to explain my analysis.

15. The analysis begins with the conditions that subsection 98(2) of the Act says must be satisfied before an interim order of this sort can be granted.

Was an organizing campaign underway at the relevant time?

16. The circumstances giving rise to the pending proceedings occurred on or around November 10, 2014. Primeline asked me to conclude that no "campaign to establish bargaining rights" was underway at that time.

17. The Union alleges that after a conversation or conversations with union officials in July and/or August 2014, Okoli began soliciting membership cards from fellow workers. He declares that he approached "more than 30 employees" about signing cards. He also says he collected employee telephone numbers, purportedly for the purpose of a lottery pool, for later use in soliciting employee support. Chow and Luong were among those to whom he spoke. They declare that they, in turn, spoke with other employees. Theiu says Chow asked him to sign a membership card on August 30, 2014, and that since then he has been a supporter of the union. The declarations indicate that Luong accompanied Okoli to a meeting with a union official in mid-September 2014 to discuss further steps in the campaign. Luong, Theiu and Ly declare that they, Chow and Truong regularly ate lunch together in the workplace, and discussed the benefits of unionization and their support for it during those lunches and in other workplace conversations.

18. As I have noted, Okoli left work for an indefinite period near the end of September 2014. He gave Primeline and the union each about a week's notice of his intention to do so. Before he left he gave the union seven signed cards and 21 employee telephone numbers. As it happens, the union obtained no other signed cards thereafter, either by the time it filed this and the companion Complaint, or by the time it filed the certification application.

19. Luong and Chow say that they became more active in the campaign after Okoli left, although the descriptions of their activities in that period are not particularly detailed. Of more significance, perhaps, is the declaration of Gerry Cadden ("Cadden"), one of the union's paid organizers, that in mid-October he began telephoning Primeline employees using the list of telephone numbers provided by Okoli. Luong declares that unnamed employees expressed surprise that they had received phone calls from the union, and questioned how the union had obtained their phone numbers. He also declares that some employees expressed concern to him that if management found out about the Union's having contacted them they might lose their jobs.

20. Cadden went to the plant on Friday, November 7, 2014 at about 4 p.m., and stood outside on the sidewalk handing out flyers to employees who are leaving at the end of their shifts. This was the first anyone had done that in this campaign. Cadden declares

that he handed out 30 to 40 flyers before a member of management came out of the building. Theiu declares that he is one of the employees who took a flyer from Cadden on this occasion, and that a lot of his co-workers were taking flyers as well.

21. Counsel for Primeline invites me to conclude that because no signed cards had been collected since Okoli's departure in late September, there was no ongoing organizing campaign when the layoff occurred on November 10, 2014.

22. I do not understand the decision in *James Dick Construction Limited, supra*, to stand for the proposition that there is some degree of success or momentum that efforts to organize must be alleged to have had before such efforts can be said to constitute an "organizing campaign" that was "underway" for purposes of subsection 98(2) at or around the time that those efforts were taking place. Okoli's departure would obviously have set back the organizing campaign that he had started, but Cadden's attempts to renew it from mid-October onward would have amounted to an organizing campaign even without the earlier actions of Okoli or the contemporaneous actions of Luong and Chow.[3]

23. I am satisfied that this condition has been met.

Is there a serious issue to be decided in the pending proceeding(s)?

24. Counsel for Primeline concedes, correctly, that this condition has been met.

Is the interim relief sought necessary for either of the purposes identified in the third condition in subsection 98(2)?

25. The Board must determine whether "[t]he interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives."

26. Because an interim order is made, if at all, before the parties' factual disputes are resolved, the focus of the first part of this condition is on whether, having regard to the facts alleged by the union and supported by its declarations, harm might occur or might have occurred that the interim relief requested might prevent from otherwise being or becoming irreparable if left unaddressed until the allegations of wrongdoing are decided on their merits. This requires informed prediction of the likely consequences of events and circumstances. As the Board observed in *MJ Manufacturing, supra*:

> 20. … It is important to note that s. 98(2)2 is at least partially a prospective provision. The section states that interim relief is necessary to prevent irreparable harm. Prevention is a concept concerned with the future. As the Board stated in Patrolman Security Services [2005] OLRB Rep. September/October 818 at para. 51:

[3] See *MJ Manufacturing, supra*, at ¶5, where an organizing drive is said to have commenced with picketing and leafleting at the employer's plant.

> Thirdly, sections 98(2)3. and 4. both require the Board to draw conclusions as to the likely prospective consequences to the parties where the relief sought is or is not granted. Both sections require the Board to attempt to anticipate the degree of harm or the labour relations consequences which will occur, as a result of the granting or withholding of relief. Both require the Board to examine the current circumstances of the parties and to then extrapolate to predict likely future outcomes.

(See also *K2 Electrical Contracting Ltd.*, supra, at ¶30.)

27. Here, the union asks for an interim order that the six individuals about whom it is concerned be both reinstated to active employment and compensated for their loss of earnings. Compensation for the period between termination/layoff and reinstatement/recall is not ordinarily provided for in an interim order, because delaying compensation until the Board determines liability for it on the merits is not ordinarily regarded as causing irreparable harm. Indeed, harm to the personal interests of the individuals for whom reinstatement or recall is sought is generally not the focus of the analysis. The harm their removal and absence from the workplace may cause the labour relations interests of the union and remaining employees is the sort of harm on which the Board focuses most closely in these matters.

28. As the Board observed in *Federal Force Protection Agency*, *supra*, (at ¶22), section 98 decisions have repeatedly recognized that "irreparable harm to the union may arise if other workers perceives that their co-workers can be terminated for exercising their lawful rights to join a union and that neither the union nor the law can protect them."

29. In the Board's experience, unorganized employees often fear that their employer will retaliate if they support unionization, even when their employer has not said or done anything that might create such a fear. This is unsurprising, given the number of occasions when it has been found or reported that one employer or another has retaliated against employees for their involvement in attempts to organize their workplaces.

30. These fears that supporting or even considering unionization may result in employer retribution are likely to grow in an employee who observes her or his employer doing something adverse to a fellow employee by whom the observer has been approached to support the union, or whom the observer otherwise knows or believes to be a union supporter. Employer conduct of that sort may have that effect even if the employer has not expressly said that it was aware of union activity or that that activity was the reason for its actions, because it may seem plausible to the employee observer nevertheless that that was the employer's motivation.

31. Hearings to determine on the merits whether anti-union animus actually played a part in an employer's allegedly unlawful treatment of union supporters may not be

completed for weeks or months. In the meantime, the ability of the other employees in the workforce to decide on, express or act on their true wishes with respect to unionization may be damaged, and increasingly so as the potential harm goes unaddressed. If the employer's adverse actions are ultimately found to have been improper, then the economic losses of the direct victims of those actions can be redressed with monetary compensation, but the remedies that can then be ordered may come too late to reverse damage caused to the union's interests and those of other employees in the workforce.

32. Another effect of removing union supporters from the workplace is that the union is thereafter deprived of workplace observers and assistants as organizing and/or litigation proceeds. The removed employees' interest in helping and availability to help may be attenuated or extinguished by having had to find and become integrated into other employment. An eventual order entitling them to reinstatement will not repair the harms that their absence would have caused to the union's interests in the meantime. Nor will it necessarily prevent loss of the excluded employee's assistance with any collective bargaining that may follow the pending proceedings, because by then the excluded employees, having moved on, may be disinterested in returning. Addressing these sorts of adverse effects of an exclusion from the workplace has sometimes been characterized as a "significant labour relations objective" for purposes of this third condition of subsection 98(2): see, for example, *Cornerstone Structural Restoration Inc., supra*. It might also be characterized as aimed at preventing an irreparable harm.

33. Primeline laid off eight employees out of an active production workforce of about 65, purportedly for shortage of work. There may then have been an impending shortage of work to which a reduction in the workforce was a sensible response; the union does not allege that the workforce increased in size or performed substantial amounts work of overtime after the layoffs. The union alleges, however, and its declarations attest, that of the eight actively employed workers laid off, five were the key union supporters who remained after Okoli departed. This seems a remarkable coincidence in a workplace in which it seems union supporters were in short supply at the time. Whenever the planning for this layoff began, the workforce saw it occur almost immediately after management saw a union organizer handing flyers to employees as they left work. Even without more, these facts would provoke in other employees fear of retaliation for any subsequent union activity.

34. Also remarkable was Primeline's "lay off" of Okoli at the same time as the others. He was either on unpaid leave or absent without leave with no established return date. He was not someone whose "layoff" would serve the usual purpose of a layoff, which is to reduce the number of employees doing paid work. The union alleges, and its declarations attest, that Okoli had started the union campaign, solicited support from numerous employees, obtained signed cards and supplied the union with employee telephone numbers for use in further organizing before he left. Primeline's having taken the trouble to "lay off" such an individual even though that would not reduce the number

of employees doing paid work is another circumstance that would likely raise or increase the fears of employees who knew of it.

35. The adverse effect that the layoffs of these six putative union supporters could be expected to have on the willingness or ability of the remaining employees to exercise their rights under the Act is something that harms the union's interests and those of the remaining employees. In the Board's experience, that harm that could become irreparable if left unaddressed. That it could harm those interests is supported by what the union's declarations say happened after the layoffs.

36. Cadden and Dan Green ("Green"), another paid union organizer, declare that they attended at the plant again on November 11, 2014 to hand out flyers. Green also attended at the plant on November 20, 2014, for the same purpose. Both declare that on these occasions, in contrast to Cadden's experience on November 7th, employees generally would not speak with them or take a flyer at all, either before or after members of management again made their presence known. Cadden also declares that he made numerous calls to Primeline employees after the layoffs, and that all of the employees he contacted refused to speak with him and/or indicated a concern with respect to their job security if they were to do so.

37. Luong declares that on the day he was laid off he afterwards received a call at home from "George," a Primeline employee whom he describes as "trusted by Medeiros." He says George told him he would speak to Medeiros to try to get him back to work. Luong further declares that George telephoned again the following day, and told him that Medeiros had said that Luong's termination was not because of a shortage of work but because of his involvement with the union.

38. There is no declaration from "George." Luong says that since that conversation on November 11, 2014, "George" has not returned his calls. This is in his reply declaration, and seems belated: Luong's contacting George to solicit his declaration would surely have been a priority for the union in the circumstances, and one would have thought timely attempts to do that would have led to the conclusion that George was incommunicado by the time Luong's initial declaration was prepared. Be that as it may, if what Luong says George told him is true, in the Board's experience it would not be surprising that George would not be a volunteer declarant (see *2224556 Ontario Limited (AGT Solar)*, 2014 CanLII 13507 (ON LRB) at ¶63).

39. Some Board decisions have emphasized that the union's case must be based on declaration from first-hand knowledge, not "hearsay": see, for example, *James Dick Holdings Limited, supra*, at ¶39. At the same time, the Board has been critical of union arguments about the effect employer conduct may have had on employees' reluctance to engage with the union thereafter when (as here) union declarants speak of the employee reluctance they encounter without stating that any of those employees had said they thought there was a connection between the employer conduct and their reluctance: see, for example, *James Dick Holdings Limited, supra*, at ¶37. I will not pause to reflect on

whether this is a contradiction. A declaration's reciting what unidentified employees have said about their states of mind and the subjective bases for those states of mind has generally been accepted in matters of this kind as support for claims that those were the employees' states of mind and the subjective bases for them (whether or not a recital of what the employees said about this is analytically hearsay), but not as support for an allegation that what the employees say about the bases for their beliefs is objectively true.

40. Thus, what Luong says George said to him supports the proposition that George said that to Luong, and also the proposition that George believed what he said, but not the proposition that what he said was true. This is enough to demonstrate that George, at least, made a mental connection between Luong's layoff and his union activities. It also raises a concern that if he was prepared to make that statement to Luong he may also have been inclined to repeat it to others still at work at Primeline. That may, in turn, have induced in those others a similar belief, whatever the objective truth may be about whether Medeiros actually said what George said he had said. The truth of any of this, of course, is a matter to be determined by the panel that hears the pending proceedings on their merits. At this point, these observations simply go to the question whether there might be harm that an interim order might prevent from becoming irreparable.

41. While at first blush the case for harmful consequences may seem weakened by the absence of hearsay about any other employee's having connected their fears to the employer conduct in issue, it must be considered that this may be the consequence of the employees' being so fearful that they were unprepared to engage with a union representative sufficiently to particularize the bases of their fears. In any event, the Board must consider what effect the employer's conduct was by its nature likely to have, in the Board's experience, even if (perhaps as a result of that effect) employees who might have been so affected are not prepared at this stage to tell the union that they were.

42. Harm that is already irreparable obviously cannot be prevented or repaired thereafter. I have considered whether the union's primary claim for certification without a vote under section 11 is inconsistent with its claim here that the third condition in subsection 98(2) his satisfied. I have concluded that it is not.

43. Section 11 of the Act provides as follows:

> 11. (1) Subsection (2) applies where an employer, an employers' organization or a person acting on behalf of an employer or an employers' organization contravenes this Act and, as a result,
>
> (a) the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote; or
>
> (b) a trade union was not able to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed

> in the application for certification appeared to be members of the union at the time the application was filed.
>
> (2) In the circumstances described in subsection (1), on the application of the trade union, the Board may,
>
> (a) order that a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit;
>
> (b) order that another representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or
>
> (c) certify the trade union as the bargaining agent of the employees in the bargaining unit that the Board determines could be appropriate for collective bargaining if no other remedy would be sufficient to counter the effects of the contravention.

44. Because the membership evidence filed with the union's certification application was numerically insufficient to permit the Board to conduct a representation vote under section 8, there is no prospect of the Board's conducting a representation vote in that application before the section 11 claim is fully adjudicated on its merits. At that point a vote will only be possible, if at all, if the panel hearing that matter concludes that Primeline has contravened the Act in such a manner that the applicant was unable to demonstrate the requisite membership support as of the date of its application for certification. The Board would then have to consider whether there is anything it could do, by way of remedial response to the employer's wrongdoing or otherwise, to ensure that a representation vote then taken could nevertheless reflect the true wishes of the employees in the bargaining unit. If it were to find that it could not – that that harm was by then irreparable – then whatever else might ensue, there would be no vote in that application.

45. Is a claim for certification without a vote incompatible with a claim that an interim order could prevent irreparable harm to employees' ability to express their wishes in a vote? If such a claim is made when no interim order is in place, it can only be taken to assert that if there continues to be no interim order then the union expects employee wishes will be unascertainable by vote by the time the underlying basis for the section 11 claim has been fully litigated. It should not necessarily be taken as asserting that that harm is already irreparable, particularly not when coupled, as it is here, with express reference to the alternative of a representation vote after an interim order is granted.

46. Having representation questions determined by secret ballot votes is clearly the Legislature's preference (outside the unique context of the construction industry). It may be that the Board has rarely ordered a representation vote after a finding under section 11

that employer conduct has prevented the union from getting the membership evidence necessary to qualify for a vote under section 8. But when a trade union that has made that claim nevertheless pursues an application for an interim order, the Board should be alert to any express or implied representation that by making the interim order the Board may create conditions in which the initial chilling effect of the alleged wrongdoing will be thawed sufficiently that the true wishes of employees might be determined by a representation vote at a later date.

47. In addition, as union counsel observed, the "necessary to achieve other significant labour relations objectives" part of this third subsection 98(2) condition may be engaged even if the "prevent irreparable harm" part is not, having regard to the interests identified earlier in paragraph 32.

48. I am satisfied that the applicant's claim for an interim order under section 98 is not undermined by its having made a claim in the pending proceedings for certification without a vote under section 11, in the circumstances of this case.

49. The actual impact of the Board's now making an interim order on the remedial options available later under section 11, if and when the Board has resort to them, will ultimately be determined by the panel that hears those matters on the merits. At this point the question is whether the third condition specified in subsection 98(2) has been met. I find it has.

Does the balance of harm favour the granting of the interim relief?

50. No pertinent harm will have been caused by any outcome of this application if that outcome is consistent with the eventual outcome of the pending proceedings. The harms to be balanced in assessing the fourth of the subsection 98(2) conditions are the harm the union will have suffered from a refusal of interim relief if the Board later finds that Primeline has contravened the Act such that a reinstatement or recall remedy is warranted, and the harm that Primeline will have suffered if interim relief is granted and the Board later finds that Primeline has not contravened the Act or has not done so in a manner that warrants a reinstatement or recall remedy.

51. I will review later the reasons Primeline says it selected the employees in question for layoff. It is sufficient at this point to note that, despite those reasons, it did not discharge any of the laid off employees for cause. All of the layoffs, even Okoli's, are said to have been temporary layoffs for shortage of work, made in the expectation that business might pick up thereafter, in which case Primeline has said it "hopes to recall laid off employees back to work." Accordingly, the harm caused to Primeline by requiring that it recall some of the laid off employees is that if business has not "picked up" in the meantime, it may have to lay off some other employee or employees whom it regards as more satisfactory in order to maintain the workforce at the size it considers appropriate in the circumstances.

52. Counsel for Primeline argues that the applicant's delay in making this application should lead the Board to dismiss it. Analytically, delay may be a relevant consideration in the balancing of harms, and may also be a consideration in exercising the discretion that remains even if the conditions in subsection 98(2) are established and the appearance contemplated by subsection 98(3) is not. I will deal with the question of delay here, in the context of a balancing of harms.

53. The events from which this application arises occurred on November 10, 2014, and came to the attention of a union official that same day. It was not until more than five weeks thereafter that this application was filed. The applicant says there were linguistic difficulties in putting together the materials to be filed, since Cantonese is the first and preferred conversational language of most of the employee declarants. It says there were also logistical difficulties, including locating Okoli, preparing his declaration and arranging to have it executed, as well as scheduling meetings with other laid-off employees who had found other employment and arranging for translation in the course of casting their experiences into the language in which declarations must be framed. Primeline argues that this is not an adequate explanation of a delay of this length, and notes that these alleged difficulties are not directly referred to in any of the materials filed by the union. Primeline does not persuasively identify any particular prejudice that the delay has caused it, however.

54. The decision in *Intercon Security Limited, supra*, refers to *William Neilsen Ltd.,* [1994] OLRB Rep. March 326, in which the Board dismissed an application for interim relief under the statutory provisions then in place because the applicant had not filed its application for 17 days after the employer announced that it would be taking the actions complained of. Those actions were a contracting out of certain work and consequent layoff of all of the employees who had been doing that work. The union sought interim reinstatement of the laid off employees. There was no organizing campaign in that case; that was not then a statutory prerequisite to ordering reinstatement on an interim basis. The Board concluded there that the harm on the union's side of the balance was predominantly, if not purely, financial in nature – a reparable harm that was not ordinarily regarded as warranting the interim relief claimed. On the other hand, by the time the application was filed the granting of an interim order would have caused considerable disruption to the employer, including potential liability to the third party to whom work at been contracted and the costs of transforming the workplace back into one in which there would be work for the laid off employees to perform. In that context the Board found that the balance of harm favoured making no order.

55. In *Intercon* the Board noted that the relevance of delay lay in its impact on the harms to be balanced. In *Value Village Stores Inc., supra,* the Board refers at paragraph 14 to prejudice caused to the responding party by the delay as a consideration in determining whether that delay should result in the dismissal of an application.

56. The harms to be balanced here are quite different from those considered in *William Neilsen.* I am not persuaded that the delay has substantially changed either the

nature or the magnitude of the harm to the employer that would have flowed from the granting of an interim order if this application had been filed more promptly.

57. Although made in the context of an application under earlier statutory provisions, these observations in *International Brotherhood of Electrical Workers*, 1996 CanLII 11186 (ON LRB), are equally apt in an application under section 98:

> 75. It is particularly important that a request for interim relief be made in a timely manner. Such relief this [sic] "extraordinary" in the sense that it is relief which is given notwithstanding that there has been no hearing or decision on the merits of the case, and is relief to which the receiving party may not be entitled in the result. Accordingly, it is appropriate for the Board to take any delay in making or pursuing an application for interim orders into account when considering whether interim relief is appropriate, or when considering whether it will entertain such an application on its merits.
>
> 76. This does not mean that the party must or should come to the Board at the first sign of trouble. It is quite appropriate for a party to take some time to consider its options, and to pursue a non-litigation resolution of the dispute. It is almost inevitable that some time will pass between the time when a dispute arises and an application for an interim order is made. The question is not whether the party has delayed in coming to the Board, but rather whether there has been undue delay in pursuing an application to the Board.

58. While I am not convinced that the union's explanation can entirely account for the delay in this case, I find (with some hesitation) that the delay is not undue in the circumstances.

59. I conclude that on balancing the harm to the employer that I have identified in paragraph 51 with the irreparable harms to the union identified earlier, the balance favours the granting of an interim order.

Does it "appear" that the employer conduct complained of "was unrelated to the exercise of rights under the Act by an employee?"

60. Subsection 98(3) of the Act cannot sensibly be interpreted to mean that interim relief may not be granted if the respondent employer simply denies having contravened the Act, or even if it presents an "arguable case" to that effect: *UPS Supply Line Solutions, supra*, at ¶35. On the other hand, the applicability of this provision cannot depend on the employer's first proving that its conduct was unrelated to an exercise of employee rights, since the provisions of section 98 are meant to be applied without first adjudicating the allegations of wrongdoing on their merits. In *Patrolman Security Services Inc., supra*, the Board concluded as follows:

> 66. With respect to the application of section 98(3), as described earlier, the Board's task is not to make findings of fact or credibility but on the contrary, to determine in a summary way, whether there is an appearance of a causal relationship between the exercise of rights under the Act and the discharges … .
>
> 67. This type of inquiry is directed at determining not whether there is a causal relationship as a question of fact, but whether it merely "looks" or "appears" to be that way on a preliminary review or scan of the information before the Board. In this sense, the inquiry is like a preliminary assessment of the quality or robustness of the evidence likely to be heard and tested in the pending application.
>
> 68. Such an inquiry is not a detailed one. It would defeat the nature and purpose of the expedited process if either the process of the inquiry itself, or the description of the information and the analysis in the reasons provided were to go into great detail.

61. In determining whether the employer conduct complained of appears unrelated to an exercise of employee rights, the Board considers the plausibility of what the employer says about its reasons for the conduct complained of, in the context in which that conduct occurred. The Board will examine the information before it and "determine whether there are 'gaps' or significant inconsistencies in the factual assertions advanced by the parties": *SITEL Customer Care Inc.*, [2006] OLRB Rep. Aug. 625, 2006 CanLII 27540 (ON LRB), at ¶46; and see *K2 Electrical Contracting Ltd., supra*, at ¶44. The Board must assess the two stories and ask itself whether (applying its experience) the employer's story seems like that of an employer engaged in a process free of anti-union animus.

62. The declarations of Medeiros and other members of management say they did not know of any union activities until Mr. Cadden that appeared at the plant on November 7, 2014, which was after Medeiros claims to have determined who would be laid off.

63. Various of the declarations on both sides address the likelihood that the union supporters would have been seen together or overheard in the workplace, as the union supporters' declarations say they may have been. Management's overhearing union talk that was not intended for its ears is not the only means by which Medeiros might have learned, before he selected them for layoff, that the employees in question were union supporters. In the Board's experience there is a real possibility in any organizing campaign that management will learn of it from an employee who, after being approached to sign a card, then advises management of the approach out of what the individual considers to be his or her own self-interest. Whether that happened here is not a matter to be decided in this application, of course, but the Board's experience is part of the lens though which the material before it must be assessed.

64. Medeiros declares that before Cadden appeared outside the plant he had decided that temporary layoffs would be required at Primeline due to a slowdown in client demand, because of Primeline's 16 ongoing projects four were ending at the end of October, three were ending at the end of November, and two were ending at the end of December. He further declares that the nine individuals to whom notice of layoff was given on November 10th (or by mail thereafter in the case of Okoli) were selected for layoff on or before November 3, 2014. I will set out later my assessment of the reasons he gives for having made these selections at that time.

65. Tina Mingone ("Mingone") is Primeline's office manager. She is said to be in charge of its accounting and human resources. She declares that Medeiros gave her the nine names on Monday, November 3, 2014, told her they would be laid off as of November 7th and asked her to prepare the necessary packages for their layoffs. At one point in her declaration she says he told her the layoffs would occur "at the end of the week," and at another point that he would be "issuing" the temporary layoffs "first thing" Monday, November 10, 2014. She was scheduled to have knee surgery on November 4th, and it had already been arranged that she would work from home during her recovery. She declares that the layoff packages were to include a Record of Employment ("ROE"), a cheque for wages owing and a cheque for any accrued and outstanding vacation pay. Mingone documented the layoffs as effective Friday, November 7, 2014, but her work on them continued as late as Sunday, November 9, 2014. She says Mr. Medeiros's son picked up the layoff packages from her home early on Monday, November 10, 2014. The son declares that he picked up those packages there that morning, and delivered them to his father at the plant.

66. Although Mingone seems to have thought that the last day of work for Luong would be Friday, November 7, 2014, and prepared his package accordingly, Luong's declaration states that he worked overtime on Saturday, November 8, 2014. While having work done on overtime may not be inconsistent with anticipating a decrease in the work available, Medeiros' declaration does not dispute that Luong worked overtime or explain why Luong would have been selected to do so despite Medeiros' having already decided that Luong would be laid off effective the previous day and having instructed Mingone to prepare an ROE and cheques on that basis.

67. Whatever Medeiros may have said to Mingone about when he would be "issuing" the layoffs, Luong and Theiu both declare that they started work at the usual time on November 10, 2014, and did not receive their "packages" until after the 9:30 a.m. mid-morning break.

68. Medeiros declares that when Primeline temporarily lays off employees due to shortages of work, as it has done from time to time in the past, the temporary layoff decisions that he makes are based on three criteria: the need for workers within each department, productivity and performance, and "attitude." He adds, as I have already noted, that because "we often expect business to pick up when more orders are secured, Primeline hopes to recall laid off employees back to work." No particulars of the

previous use of this alleged layoff process are provided to contradict the equally unparticularized assertion in Theiu's earlier declaration that past layoffs have been on the basis of seniority.

69. Medeiros declares that Okoli was employed by Primeline from November 2006 to February 2012, at which time he left, and was then "rehired" on February 26, 2013. He says that when Okoli told him on September 23, 2014, that he was leaving "for vacation" on September 29th, he asked Okoli more than once when he intended to return and Okoli refused to answer. (Okoli's version is that he answered that he could not say when he would return, and that Medeiros replied "okay.") Medeiros declares that when Okoli left he was "absent without leave." He does not say, however, that he told Okoli before he left that he would be considered "absent without leave" if he did, nor that he took any steps to discipline or discharge Okoli on that basis at any time between Okoli's departure and the layoff.

70. Medeiros declares that he selected Okoli to be laid off because he was absent without leave and had "a long history of attitude and performance issues, including"

> (i) On October 29, 2013, Okoli got into a verbal dispute with two other Primeline employees, Lenroy Lindsay and Marcus Sewall. The police were called with respect to this incident. Okoli was suspended and specifically warned that should he engage in any similar conduct, his employment would be terminated.
>
> (ii) In June 2014, I observed Okoli and Quoc Quang Luong ("Luong") throwing peanuts in the air. I instructed them to stop this behaviour immediately. Okoli and Luong failed to return to work until the fourth or fifth warning.
>
> (iii) Throughout August and September 2014, I repeatedly observed Okoli taking unapproved breaks, during which time he would wander the Facility disturbing other employees' work productivity and take personal calls. On several occasions, I issued verbal warnings and counselled Okoli.

In his reply declaration Mr. Okoli offers a different version of some of the incidents described, as does Luong with respect to the second incident listed.

71. Chow's employment by Primeline is said to have begun March 6, 2013. It is common ground that on November 10, 2014, Chow arrived at work with a letter of resignation that he gave Medeiros. The resignation letter identified in Medeiros' declaration gives two weeks' notice of resignation. Chow declares that when he handed Medeiros his letter of resignation Medeiros responded that he "would think about it," returned to his office, and later handed Chow an envelope containing an R0E and paycheque and told him to leave.

72. Medeiros declares that he was surprised to learn that day that Chow wished to resign. He says that rather than accept Chow's resignation, he gave him the layoff package that had already been prepared "as a gesture of goodwill in order to allow Chow the opportunity to collect Employment Insurance if necessary and in order to provide him with time to reconsider whether he wanted to terminate his employment with Primeline."

73. Medeiros' declaration does not say, however, why he selected Chow for layoff before learning of Chow's intention to resign.

74. Medeiros declares that Ly was employed by Primeline from June 2009 until his layoff November 10, 2014, and that Theiu worked from August 2002 to March 2003, was then laid off, was "rehired" March 2004 and worked until April 2010, was laid off again, and was "rehired" August 2010 and worked from then until his layoff on November 10, 2014.

75. Medeiros declares that Ly and Theiu were selected for layoff because:

> (a) On several occasions supervisor Raymond Ling [sic] told me that Ly and Theiu were noticeably slow, which caused issues amongst other employees who felt that they were not carrying their share of the work.
>
> (b) Ly and Theiu had very low productivity in comparison to other employees in the Glazing department.
>
> (c) There are many sizes of windows which glazers are required to work on. They chose them as they come ready. Ly and Theiu consistently selected the smallest windows (transom windows) rather than take on larger frames.

There is no explanation why their selecting smaller windows, if they did, would be problematic. They deny that selecting smaller windows is objectionable. Supervisor Raymond Lin declares that he did make the observations alleged in paragraph (a) and did report them to Medeiros. He does not say, however, that he ever spoke to either employee about these supposed transgressions, either when they occurred or after he made the alleged report to Medeiros. Nor does Medeiros say that he took any action, or instructed Lin to take any action, about what Lin had allegedly reported, either when he received the alleged report or at any time thereafter. Ly and Theiu deny they were slow or unproductive, as alleged in the first two quoted paragraphs. They further deny that any of these matters was ever raised with them.

76. Medeiros declares that Luong was employed by Primeline from November 1998 to September 2006, was then laid off, and was rehired in August 2007 and worked until his layoff on November 10, 2014. Medeiros declares that Luong was selected for layoff for the following reasons:

> (a) Luong had a very poor attitude and was not well liked by other employees. In or around early August 2014, I noticed that Luong was not working at his station and was wandering around the Facility. I asked Luong why he was not working. In response, Luong loudly, in an aggressive tone, and in front of other employees, said "Why don't you fire me". I specifically told Luong that if he was not content working at Primeline he could resign and told him he could leave anytime.
>
> (b) I was advised that on several occasions, Luong instructed employees to slow down their work productivity in order to ensure that the work didn't dry up and so that the employees would have the option of choosing to work Overtime Shifts.

Luong has a different version of the incident described in the first reason. He denies the misconduct alleged in the second. The Medeiros declaration does not identify the source of the allegations in that second reason, nor is there any declaration by anyone claiming first-hand knowledge of the misconduct it alleges. Perhaps more significantly, neither Medeiros nor anyone else claims to have spoken to Luong about, or disciplined him for, this very serious alleged misconduct.

77. Counsel for the applicant observes that ROEs issued to the other three employees laid off on November 10, 2014, show their first days of work as July 3, 2012, September 12, 2013, and September 30, 2014. He argues that this is considerably less seniority than the laid-off union supporters had, which seems true for all except Chow (about whose selection for layoff no explanation is given). He further argues that there must have been other employees with less seniority than the union supporters who, as a result, would have been more likely candidates for layoff, on any rational criteria, than the union supporters were. There is almost nothing in the union's materials, however, about the work records or disciplinary history of any of the employees anyone other than the six laid off employees about whom the union is concerned.

78. This is equally true of Primeline's declarations. None of them says anything about the work records or disciplinary history of any of the employees other than the six laid off employees about whom the union is concerned. After disputing that Primeline's layoff process is as described by Medeiros, Luong's reply declaration says if that had been the employer's process, then his co-worker "Lindsay" should have laid off instead of him, because "Lindsay" had had two warning letters that Luong is aware of: one for fighting with "George" and another for an incident like the one referred to in Medeiros' explanation of his decision to layoff Okoli.

79. While making layoff decisions on the basis on which Medeiros says he made them would seem to involve applying his criteria to more than just the employees ultimately selected, there is no reference to what it was about the employees who were retained that resulted in their doing better on these criteria than those who were selected. There is no reference to any document or discussion in which Medeiros or any other

member of management had ranked the work force in accordance with its alleged layoff criteria. By contrast, the employer in *MJ Manufacturing, supra*, was able to point to a colour-coded spreadsheet that had ranked all of the employees the work force on the likelihood that they would be laid off, a spreadsheet that had been prepared before the organizing campaign in that case had begun. The Medeiros declaration makes no attempt to demonstrate that, when compared to other employees on those criteria, the subject employees had ranked worst. It does not even contain a bald assertion to that effect. Of course, Medeiros would not have been casting about for information about other employees if he was only looking for an after-the-fact rationalization of decisions he had already made for other reasons.

80. This is not a case like *Wallaceburg Preferred Partners Corp., supra,* in which the Board found that the employer had provided "a complete and plausible explanation" of its having discharged the union's inside organizer, with "no significant gaps in its explanation that gave rise to an inference that, notwithstanding its denial, it was aware" that the discharged individual was organizing for the union and had been terminated for that reason. Here, there are significant improbabilities, peculiarities and gaps in Medeiros' explanation of his having selected these particular six individuals for layoff. This does give rise to an inference that those selections were a reaction to their union activities.

81. An appearance that the employer's selections of employees for layoff were unrelated to their exercise of rights under the Act does not arise here. Indeed, it "appears" otherwise. Again, whether what "appears' to be the case is true will be determined by the panel that hears the Complaint and section 11 claim on their merits.

The Interim Order

82. Although the applicant characterizes the layoffs as terminations, it is unnecessary for present purposes to treat them otherwise than as what Primeline says they were: temporary layoffs. When the conditions in subsection 98(2) are established and the appearance contemplated by subsection 98(3) is not, as I have determined here, the Board can issue an interim order requiring recall of employees allegedly selected for layoff because they were union supporters: *Cornerstone Structural Restoration Inc., supra.*

83. Primeline observes that the union filed no declaration by Truong. I gather its position is that for that reason his recall should not be included interim order. It also questions whether Chow and Okoli should be included, having regard to Chow's letter of resignation and Okoli's having absented himself from the workplace for an indefinite period long before the layoff took place.

84. While this is not a case of a "mass discharge" to thwart an organizing campaign, if it were such a case it would surely not be necessary for the applicant to have filed declarations from every discharged employee, if the declarations it did file were

sufficient to demonstrate that there was evidentiary support for the essential factual elements of the claim that all were terminated for improper reasons. Here, the declarations of the other laid-off employees speak from first-hand knowledge about a basis for the allegation that Truong would have been perceived by management to be a union supporter based on his interactions and apparent relationship with all or some of those who declare they were union supporters. In the circumstances, the absence of a declaration from Truong is not a basis for excluding him from the interim order sought.

85. Although technically Chow's resignation was not accepted by Primeline, his having tendered it clearly raises a question whether he wants to work there. If his declaration had made it clear that he was seeking to return to work on some rationale consistent with his having tendered that resignation, my interim order in this matter would certainly require that he be offered recall. It does not, however. He may eventually be found to have a valid claim for the two weeks' pay he would have earned in the notice period his resignation letter stipulated if his resignation had been accepted on its terms, but it would seem odd in the circumstances to include him in an interim order that he be offered recall.

86. Likewise, if there were anything in Okoli's declaration, or in his reply declaration, to indicate that he is seeking to return to work at Primeline now, or that he would have been if he had not received the R0E on December 21, 2014, I would be inclined to include him in an interim order that he be offered recall, since Primeline has not treated his employment as at an end however it may now characterize his leave-taking. As it is, the closest Okoli's reply declaration comes to the subject are his assertions that he had never told Primeline he was not returning, and that before getting the R0E on December 21, 2014, he had believed he was still considered an "active employee," whatever he may think that means. His having come that close to the subject without saying that he wishes to return to work now leads me to the conclusion that he does not. In those circumstances, as with Chow, it would seem odd to include him in an interim order requiring that he be offered recall.

87. Although Chow and Okoli are not included in the recall order, that does not allow Primeline to refuse any subsequent application either of them may make to return to work if their past involvement in the union's organizing campaign plays any part in its refusal.

88. Accordingly, the Board orders Primeline Windows and Doors Inc. to:

(a) offer reinstatement or recall from layoff to each of Quoc-Quang Luong, Van Vihn Ly, David Truong and Chi-Cuong Theiu; and,

(b) post copies of this decision and the attached Notice to Employees in locations in the workplace where the

employees are likely to see them, and keep them posted for at least 30 working days.

It would be unfortunate if giving effect to the direction in subparagraph (a) were to become the subject of a debate about its mechanics. Accordingly, and unless the parties otherwise agree:

(c) each offer of reinstatement or recall required by paragraph (a) shall be in writing, and will be considered made when Primeline has delivered a copy to the applicant and sent the original to the addressee by ExpressPost or courier, to an address to be provided by the applicant within two full business days after the date of release of this decision or, if no address is so provided within that time, to the addressee's last known address, and

(d) each such offer shall be made as aforesaid within one week of the date of release of this decision. It must be open for acceptance by the employee for two weeks from the date the offer is made. Acceptance is to be in writing and delivered to Primeline within that time, and the employee's return to work is to occur on a date agreed to by the Primeline, the employee and the applicant or, failing agreement by all three, a date selected by Primeline and communicated to the applicant and the employee that is no less than one week and no more than two weeks after the employee's acceptance is received by Primeline.

The Labour Relations Act, 1995

NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

Primeline Windows and Doors Inc. has posted this notice in compliance with a direction of the Ontario Labour Relations Board, issued in a proceeding in which both the company and the union had the opportunity to make submissions.

The Board has ordered Primeline Windows and Doors Inc. to reinstate or recall from layoff Quoc-Quang Luong, Van Vihn Ly, David Truong and Chi-Cuong Theiu from layoff **ON AN INTERIM BASIS** until the Board considers the reasons for their layoffs on or about November 10, 2014. A hearing before the Board will commence soon. The purpose of that hearing is to determine the reasons why Quoc-Quang Luong, Van Vihn Ly, David Truong and Chi-Cuong Theiu were laid off on or about November 10, 2014.

The full reasons for this order are set out in a decision dated January 26, 2015, which Primeline Windows and Doors Inc. has been directed to post along with copies of this order.

If the Board ultimately determines that Quoc-Quang Luong, Van Vihn Ly, David Truong and Chi-Cuong Theiu were laid off for reasons that had nothing to do with their support for a Union, the Board's order will have no further effect.

If the Board ultimately finds that Quoc-Quang Luong, Van Vihn Ly, David Truong and Chi-Cuong Theiu were laid off on or about November 10, 2014, because he was a union supporter, exercising his rights under the *Labour Relations Act,* the Board may direct that he be compensated for all earnings and benefits lost as a result of that layoff.

Employees in Ontario have these rights which are protected by law:

> An employee has the right to join a trade union of his or her own choice and to participate in its lawful activities.
>
> An employee has the right to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.
>
> An employee has the right to cast a secret ballot in favour of, or in opposition to, a trade union if the Ontario Labour Relations Board directs a representation vote.

An employee has the right not to be discriminated against or penalized by an employer or by a trade union because he or she is exercising rights under the *Labour Relations Act, 1995*, as amended.

An employee has the right not to be penalized because he or she participated in a proceeding under the *Labour Relations Act, 1995*, as amended.

An employee has the right to remain neutral, to refuse to sign documents opposing the union or to refuse to sign a union membership card.

It is unlawful for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filled with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act, 1995*, as amended.

3319-13-R International Union of Operating Engineers, Local 793, Applicant v. **Quality Haulage and Farming Ltd.**, Responding Party

Bargaining Unit – Certification – Construction Industry – Status – The main issue before the Board was whether an off-site mechanic was properly included in the bargaining unit – The Board had previously determined the appropriate bargaining unit encompassed all employees engaged in operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in repairing or maintaining same – The mechanic worked in the equipment repair shop adjacent to the construction site and repaired construction equipment as well as other vehicles and equipment from time to time – The mechanic never repaired equipment on-site, but occasionally attended the site to bring equipment back to shop – To include off-site employee in construction bargaining unit, it must be established the employee is commonly associated in work or bargaining with on-site employees in accordance with s.126(1) of the *Act* – The Board determined the mechanic was not to be included in the bargaining unit – Because the mechanic never engaged in the repair of equipment on-site, the Board rejected the employer's assertion he was commonly associated in work with on-site employees – Individuals who are not on-site employees or employees within the meaning of s.126(1) cannot come within a construction industry bargaining unit for the purposes of an application for certification

BEFORE: *Harry Freedman*, Vice-Chair

APPEARANCES: *Kirsten Agrell* and *Ross McBeath* for the applicant; *Andrew Reynolds* and *Scott Heffern* for the responding party

DECISION OF THE BOARD: February 20, 2015

1. The Board (differently constituted) in its decision dated March 10, 2014 in this construction industry certification application being dealt with under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") determined, among other things, the description of the appropriate bargaining unit pursuant to section 158(1) of the Act but was unable to determine on the basis of the materials filed by the parties the number of employees in that bargaining unit who were members of the applicant on February 28, 2014, the date this application was filed. As a result, this matter proceeded to a Case Management Hearing.

2. In its decision dated April 11, 2014 following the Case Management Hearing the Board, again differently constituted, outlined a number of issues in dispute and in particular described several categories of challenges made by the applicant to the list of employees filed by the responding party. In its subsequent decision dated July 16, 2014 the Board made a number of determinations with respect to both evidentiary issues and some of the outstanding status disputes or challenges made by the applicant. The Board in that July 16th decision directed the parties to proceed with respect to the remaining status disputes as more particularly described in its April 11th decision.

3. The Board heard the testimony and received evidence from a number of witnesses over several days of hearing with respect to several status disputes. After the conclusion of the evidence and before the parties made their final submissions with respect to some of the persons in dispute, the parties advised the Board that they had reached an agreement with respect to some of the outstanding status disputes. The parties agreed that for purposes of determining this application, No. 21—JL was in the bargaining unit and at work on the application date while Nos. 4—JB, 14—SH and 15—JH were not employees in the bargaining unit.

4. In addition to the two individuals the applicant continued to challenge on the basis that they were not the employees of the responding party (Nos. 16—RH and 20—DL) and who the parties agreed would be dealt with at a later date, if necessary, the parties made their final submissions with respect to No. 6—RC, No. 9—GE and No. 11—CF.

5. As the responding party contended that all the individuals the applicant had challenged were employees at work in the bargaining unit on the application date, it proceeded first with its submissions. After the Board heard from the responding party, it recessed and upon returning advised the applicant it did not need to hear from it with respect to No. 11—CF, and provided the parties with brief reasons at the hearing for sustaining the applicant's challenge to No. 11—CF. The Board indicated that written reasons elaborating on the brief oral reasons provided at the hearing would be set out in its written decision.

CHALLENGE TO NO. 11—CF SUSTAINED

6. No. 11—CF was employed by the responding party exclusively as a shop mechanic and was at work on the application date. CF did not work at the construction site (clearing the overburden for the expansion of the Lafarge gravel pit in Goodwood) but worked in the responding party's equipment repair shop. The responding party's shop and office premises were on land owned by the responding party that was adjacent to the Lafarge property where the Lafarge gravel pit was located.

7. CF was never assigned to work on site to repair the construction equipment operated by the responding party's employees (excavators, bobcats, loaders, rock trucks and bulldozers) but on occasion went to the construction site to bring a piece of equipment back to the shop. Another individual the parties agreed was in the bargaining unit who supervised CF was the mechanic who performed repair work on construction equipment both on site and in the shop. In addition to working on construction equipment in the shop, from time to time CF engaged in repair work on other equipment and vehicles, such as pickup trucks, wood chipper, motorcycles, and snowmobiles owned by the responding party. It was clear to me from the evidence that CF had spent the majority of his day on the application date engaged in the repair of construction equipment in the responding party's shop.

8. The appropriate bargaining unit as determined by the Board in its March 10th decision encompassed all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same.

9. Since this is an application in relation to the construction industry the employees in the bargaining unit must be employees in the construction industry. Prior to the amendment to the Act in 1971 which added the definition of "employee" to what is now section 126(1), individuals who primarily worked off-site repairing construction equipment in a shop were treated by the Board as employees who came within an industrial bargaining unit rather than a bargaining unit of on-site construction employees. See *J. & M. Chartrand Realty Limited*, [1978] OLRB Rep. May 423; *Fielding Construction Company Ltd.*, [1970] OLRB Rep. Jan. 1205; and *Bill Brownlee Excavating Limited*, [1988] OLRB Rep. Apr. 364 (application for reconsideration dismissed [1988] OLRB Rep. July 645).

10. Employees who are not on-site employees may nevertheless fall into a construction industry bargaining unit if they come within the definition of "employee" in section 126(1) of the Act. Section 126(1) defines an employee as including "an employee engaged in whole or in part in off-site work but who is commonly associated in work or in bargaining with on-site employees".

11. The test for determining whether an off-site equipment mechanic comes within a construction industry bargaining unit of operating engineers was set out as follows in *Graham Bros. Construction Limited*, 2005 CanLII 18256 (ON LRB); [2005] OLRD No. 2145 at paragraph 90:

> The Board's jurisprudence reveals that when dealing with the issue of whether mechanics are to be included in the Operating Engineers' standard craft unit, there are two issues that must be addressed. First, to be included in the unit the mechanic must be either an on-site mechanic or a mechanic who is "commonly associated" in his work or bargaining with on-site employees. In determining whether there is a sufficient nexus to the site employees to meet the "commonly associated" requirement, the Board will look at whether the mechanic "regularly and routinely" works both at the shop and on-site. Alternatively, the Board may look to see whether the shop mechanics are commonly associated in bargaining with on-site employees such that there is a sufficient nexus to bring the employees within the construction industry. Second, even if the mechanic is found to be an on-site mechanic or "commonly associated" with on-site employees, the mechanic must have spent a majority of his day on the date of application performing bargaining unit work.

In setting out that principle in *Graham Bros. Construction Limited*, the Board referred to a lengthy passage from *Bill Brownlee Excavating Limited*, *supra*, in which the Board wrote at page 369:

> Employees who are off-site and who only very briefly go on site irregularly are not commonly associated in their work with on-site employees.

12. The responding party relied on *Esam Construction Ltd.*, [1980] OLRB Rep. Feb. 197 and *Wraymar Construction and Rental Sales Ltd.*, [1989] OLRB Rep. June 682 to assert that CF, despite working exclusively off-site in the shop, was nevertheless "commonly associated" with the responding party's on-site employees.

13. I disagree.

14. Since CF repaired construction equipment exclusively in the shop, he was an off-site employee. Because he had never been engaged in the repair of equipment on-site, I reject the responding party's assertion that CF was commonly associated in his work with on-site employees.

15. The responding party points to *Wraymar Construction and Rental Sales Ltd.* where the Board at page 686, after making reference to the decision in *Bill Brownlee Excavating Limited*, wrote:

> One of the respondent's mechanics in that case spent the entire date of application working off-site in a shop apparently within the geographic area to which that application related. The Board found that employee to be commonly associated in his work or bargaining with on-site employees in the bargaining unit (within the meaning of section 117(b) of the Act) and that he should be included in the bargaining unit for purposes of the application for certification. In doing so, the Board followed the decision in *Esam Construction Limited,* [1980] OLRB Rep. Feb. 197 and disapproved of the decisions in *J & M Chartrand Realty Limited,* [1978] OLRB Rep. May 423 and *590308 Ontario Inc.,* Board File No. 0915-87-R, November 26, 1987, unreported, which latter decisions make no reference to section 117(b). With great respect, we prefer and agree with the approach in *Bill Brownlee Excavating Limited, supra,* and *Esam Construction, supra.*

The Board in *Wraymar Construction and Rental Sales Ltd.* then wrote at page 688 after discussing the bargaining unit description mandated by the applicant's designation order:

> In this case, the designation order and the description of the bargaining unit which the Board has found to be appropriate do not differentiate between on-site and off-site mechanics. In the result, and having regard to the above analysis, we find ourselves constrained to conclude that notwithstanding the distinction which appears to have been made between them within the labour relations community, *both on-site and off-site mechanics who were at work on the date of application must be included on the list of employees*, both in this case and generally in an operating engineers' bargaining unit which is the subject of an application for certification made pursuant to section 144(1) [now section 158(1)] of the Act. [emphasis added]

The responding party emphasized that the approach described by the Board in *Wraymar Construction and Rental Sales Ltd.* must result in the Board finding that CF was in the bargaining unit despite not having worked on-site because he was an off-site mechanic.

16. The Board in *Esam Construction Ltd., supra*, considered whether an off-site employee who was "engaged in operating equipment which is referred to in the bargaining unit" and was "engaged solely in work which in its entirety is destined directly or indirectly for the construction site" was in the operating engineers bargaining unit. The Board held that the employee in issue was "engaged solely in the flow of work to the construction site and was commonly associated in his work with on-site employees" and therefore was in the bargaining unit.

17. In my view, the circumstances considered by the Board in *Esam Construction Ltd.* were very different from the work situation of CF. CF worked off-site in the responding party's shop repairing construction equipment and other vehicles and equipment from time to time. He did not work on-site.

18. The nature of the work normally performed by CF is, in my view, much closer to the situation the Board discussed in *Warren Bitulithic Limited*, [1981] OLRB Rep. March 376 in which the Board wrote at page 380:

> In *Taggart Construction Limited, supra,* [[1974] OLRB Rep. March 190] the Board held that where such interchange occurred only rarely, uncommonly and briefly off-site employees were not commonly associated in their work with on-site employees within the meaning of section 106(b) [now 126(1)]. While it is clear that most of the construction material is destined for the respondent's own use, the fact that pit and yard work is part of a sequence of operations which leads up to on-site work is not, in itself, sufficient to make off-site employees commonly associated in their work with on-site employees. See *C. A. Pitts Engineering Construction Ltd., supra* [[1973] OLRB Rep. Feb. 123]. There is no indication in the instant application that the off-site employees spend time on construction sites on other days on a regular basis. In *Esam Construction Limited, supra,* the Board included on the list for the purpose of the count two off-site employees who spent time on a construction site on other days on a *regular basis* and found that they were commonly associated in their work with on-site employees within the meaning of section 106(b).

19. In my view the statement made by the Board in *Wraymar Construction and Rental Sales Ltd.* on which the responding party relies ("both on-site and off-site mechanics who were at work on the date of application must be included on the list of employees") must be read in context and in light of the Board in that decision explicitly stating that it preferred the approach taken in *Bill Brownlee Excavating Limited.* The Board in *Wraymar Construction and Rental Sales Ltd.* when it referred to "employees" obviously meant employees in the construction industry as defined by the Act.

Individuals who are not on-site employees or employees within the meaning of section 126(1) of the Act cannot come within a construction industry bargaining unit for purposes of an application for certification. Therefore, as the Board noted in *Bill Brownlee Excavating Limited*, off-site employees are not employees in the construction industry if they are not commonly associated in their work with on-site employees. Despite the broad statement made in *Wraymar Construction and Rental Sales Ltd.* which when taken out of context would tend support the position advanced by the responding party, I am satisfied that off-site mechanics who are not employees in the construction industry do not come within an operating engineers bargaining unit for purposes of an application for certification in the construction industry.

20. Simply put, I am of the view that off-site employees (or the "off-site mechanics who were at work on the date of application") cannot be employees in the construction industry and therefore cannot come within the operating engineers bargaining unit that is the subject of a construction industry application unless those off-site employees "are commonly associated in their work or bargaining with on-site employees".

21. In this case, CF was not commonly associated in his work with on-site employees (and there was no element of "bargaining" to consider).

22. As a result, CF was not an employee in the bargaining unit on the application date and the applicant's challenge in respect of CF is sustained.

23. After the Board sustained the applicant's challenge to CF, it received the applicant's submissions in response to the argument that No. 6—RC and No. 9—GE were at work on the application date and the responding party's reply. The issue with respect to both Messrs. RC and GE was whether they were actually present and working at the responding party's job site on the application date. There was no doubt that if they were in fact at work on that date, then they were engaged in bargaining unit work.

24. There was no dispute between the parties that both RC and GE had been employed by the responding party. GE had been working for the responding party for a few weeks prior to the application date operating a bulldozer to level and maintain a roadway for the rock trucks that were moving the overburden from the area where the responding party was working to expand the Lafarge gravel pit to the dump area. RC had worked for the responding party after the application date operating an excavator. The responding party claimed that RC had started work on the date the application was filed, working for some three hours first thing in the morning on that day.

25. The parties in their detailed and extensive submissions reviewed both the testimony given by the witnesses and the documentary evidence filed as exhibits. After the parties had completed their submissions the Board provided brief oral reasons dismissing the applicant's challenges and finding that GE and RC had been at work on the application date and were therefore employees in the bargaining unit.

CHALLENGE TO NO. 6—RC AND NO. 9—GE DISMISSED

26. Both RC and GE testified they had been at work at the responding party's job site at the Lafarge gravel pit in Goodwood on February 28th. They identified their handwriting on the time sheets and work tickets they had completed and submitted in respect of that day and for which they were paid.

27. RC testified that February 28th was his first day at work and recalled that he had worked for about three hours that first morning in front of a supervisor who was assessing whether he had the ability to work on an excavator. He said that he had been working on the excavator for some three hours and then left. He came back to work the next day.

28. GE testified that he had been off work the day before the application date to deal with a matter in traffic court on February 27th and was back at work on the application date operating a bulldozer levelling the roadway for the rock trucks.

29. Both RC and GE had some specific recollection of that day as it was the first day RC came to work for the responding party and GE had been in traffic court the day before.

30. The applicant called evidence for the purpose of establishing that neither RC nor GE had been at work. The testimony from the applicant's witnesses was, in effect, that neither RC nor GE was seen by them on the application date at the work site. They also explained why they believed it was unlikely that RC and GE had been operating the equipment they claimed to have been working on because they knew what excavators and bulldozers were being used on the application date and who was operating that equipment.

31. The testimony from the applicant's witnesses established some contradictions to the testimony given by RC and GE. Nevertheless, based on the objective evidence introduced at the hearing, I was satisfied that it was more probable or likely that both RC and GE were at work on the application date as they claimed.

32. In coming to that conclusion, I do not for a moment suggest that the applicant's witnesses had attempted to mislead the Board or had fabricated their evidence. One of the applicant's witnesses, for example was certain that two people who were not in issue were at work on the application date but then when confronted with documentary evidence establishing that they had not been there acknowledged he had been mistaken.

33. Moreover, the witnesses who were called by the applicant to give evidence and who had been working for the responding party on the application date had not made any notes about who they saw or what work was being done, and were relying on photographs taken by one of them, their own time sheets which dealt with what work

they had done but did not relate to what other work was being done and their recollection of what had taken place on the work site several months before the hearing. It was also apparent from their testimony, and particularly as a result of their cross-examination that they were, quite understandably, somewhat confused about what had taken place on February 28th and what had occurred a few days later.

34. In the absence of any documents or notes they had made at the time, and in view of their testimony during cross-examination that indicated that their recollections of that particular day were not as clear as they had believed, I have concluded that there is a reasonable likelihood that they had been mistaken when they asserted that RC and GE were not at work on February 28th.

35. The testimony of both RC and GE, although challenged vigorously in cross-examination, was not shaken. They were both clear about what work they had done on the application date by having regard to the time sheet and work tickets they had completed on that day and had identified as being in their own handwriting, and from their memory of the day given that in the case of GE he had been away from work the day before because he was in traffic court and it was the first day of work for RC. In addition, their testimony was, as the responding party pointed out in its submissions, both internally consistent and quite reasonable, and more importantly, was supported by the documentary evidence, including the cheques, time sheets, and work tickets, introduced into evidence.

36. In order to accept the applicant's theory and prefer the evidence given by its witnesses over the testimony and evidence presented by the responding party and thereby find that neither RC nor GE were at work on the application date, the Board would have to conclude that the time sheets and work tickets introduced into evidence and identified by each of them as being in their writing and completed on the application date had been fraudulently created by them at the behest of the responding party after the application had been filed in order to deliberately mislead the Board.

37. I note that cheques issued by the responding party to employees or individuals who are paid as "contractors" are sequentially numbered. The cheques that were issued to RC and GE appeared to be in a sequence based on the cheque numbers which suggested their cheques were issued before and after the cheques to individuals who the parties agreed were at work in the bargaining unit on the application date had been issued.

38. There was, in my view, no proper evidentiary basis on which the Board could find as a fact that the documentary evidence introduced by the responding party in this proceeding had been manufactured after the application had been delivered to the responding party in order to mislead the Board.

39. The applicant's challenge to No. 6—RC and No. 9—GE is therefore dismissed.

40. Following the Board's ruling with respect to the status of Nos. 6—RC, 9—GE and 11—CF the parties and the Board reviewed the list of employees who the Board determined or the parties agreed were in the bargaining unit on the application date. In addition, the parties noted that there are two other individuals who the applicant has challenged that the responding party claims were its employees who were at work in the bargaining unit on the application date. Those two status disputes remain outstanding. The resolution of those two status disputes may or may not be material to the ultimate disposition of the application.

41. The parties accepted that based on the Board's determinations to date (and the parties' agreement) there were 17 employees in the bargaining unit on the application date, and that there are two others who remain in dispute.

42. The Board in its March 10th decision determined that the following unit of employees was appropriate for collective bargaining:

> all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of the responding party in all other sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman.

43. The applicant had filed membership evidence on behalf of 21 persons, 9 of whom correspond with the names of the 19 persons who are or who may be found to come within the bargaining unit. Regardless of the ultimate disposition of those two remaining status disputes, the level of membership evidence filed by the applicant among the employees in the bargaining unit will be between 40% and 55% of the bargaining unit employees. In other words, whether the applicant is or is not successful with its last two challenges, it will not have filed membership evidence on behalf of more than 55% of the employees in the bargaining unit.

44. On the basis of the information provided in the application (including the information and membership evidence filed by the applicant), the information provided

under subsection 128.1(3) of the Act), the parties' agreements and the Board's determinations up to the date of this decision, the Board is satisfied that at least 40% but not more than 55% of the individuals in the bargaining unit the Board has determined is appropriate for collective bargaining were members of the applicant on the date the application was filed. Accordingly, the Board pursuant to section 128.1(12) of the Act directs that a representation vote be taken among the employees who were in the bargaining unit on the date this application was filed, including the two individuals who are in dispute.

45. The parties agreed that the following 19 individuals are eligible to cast a ballot, subject to the ballots cast by No. 16—RH and No. 20—DL being segregated and sealed pending further direction from the Board or the agreement of the parties:

a) No. 2—JB
b) No. 5—LC
c) No. 6—RC
d) No. 7—CC
e) No. 8—JD
f) No. 9—GE
g) No. 10—TF
h) No. 12—RG
i) No. 13—BH
j) No. 16—RH*
k) No. 18—DL
l) No. 19—DL
m) No. 20—DL*
n) No. 21—JL
o) No. 22—JMcK
p) No. 24—NM
q) No. 26—BR
r) No. 27—SS
s) No. 29—MS

*The ballots cast by those two individuals are to be segregated and sealed pending agreement of the parties or further direction from the Board.

46. On agreement of the parties, the vote will be held on Thursday March 12, 2015 between the hours of 7 a.m. and 9 a.m. local time at the responding party's premises at 388 Highway 47 Goodwood. Vote arrangements are set out in the "Notice of Vote" attached to this decision.

47. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.

48. Any party or person who wishes to make representations to the Board about any issue relating to the conduct of the representation vote or any other issue arising between the date of this decision and the date of the vote must file a detailed statement of representations and all material facts upon which they rely with the Board and deliver it to the other parties, so that it is received within five days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken.

49. In the event the resolution of the two outstanding status disputes are material to the ultimate disposition of this matter or a party or employee files a detailed statement of representations within five days of the date the vote is held, the hearing of this matter will continue as scheduled in the Board Room, 505 University Ave, 2nd floor, commencing at 9:30 a.m. local time on May 28, 2015 before this panel of the Board.

50. The Board directs the responding party to post copies of this decision and the "Notice of Vote" in a location or locations where they are most likely to come to the attention of those individuals who are eligible to vote.

1346-13-R Carpenters' District Council of Ontario, Local 2486, Applicant v **RioCan Real Estate Investment Trust**, Laing Property Corporation, Campeau Corporation Limited, Timmins Square Shopping Centre Inc. and 1451945 Ontario Limited, Responding Parties

Abandonment – Bargaining Rights – Construction Industry – Sale of a Business – Trade Union – Following the commencement of substantial construction work at the Timmins Square Mall, the Carpenters filed a grievance alleging violations of the collective agreement and an application alleging a sale of business asserting bargaining rights with RioCan at the Mall –RioCan argued the Carpenters abandoned their bargaining rights either (a) prior to the legislative amendments in 1980; or (b) following visible substantial construction work in 2005/2006, during which time the Carpenters did not take action to protect their bargaining rights –The Carpenters had been certified as the bargaining agent for Campeau prior to 1978 – If bargaining rights were not abandoned prior to amendments to the Act in 1980, Campeau would have become bound to the Carpenters province-wide at that time – The Board held it was appropriate for it to examine the union's conduct after the legislative amendments in 1980 to determine whether the Carpenters had abandoned their bargaining rights – The Mall was sold several times over the two decades following 1978 – No remittance of dues or pension contributions were made by Campeau to the Carpenters at any time from 1977 to 1990, none of the collective agreements were renewed, and there was no evidence of other union activity – However, there was no evidence of failure to comply with the collective agreement, such as any construction work by Campeau that would otherwise be performed by members of the Carpenters – An absence of union activity does not establish abandonment when there is no evidence of construction activity – A union is not required to actively pursue its bargaining rights during periods where the employer is not operating in the geographic scope of the collective agreement – The Board

found the Carpenters had not abandoned their bargaining rights prior to the legislative amendments in 1980 – When the next major construction work was performed at the Mall in 2005/2006, the work was subcontracted to both union and non-union subcontractors – RioCan argued the Carpenters were aware of the construction work being performed at the Mall and decided not to pursue their bargaining rights – However, the Carpenters clearly raised their objection to the work being performed outside the terms of the collective agreement when they filed a grievance against RioCan – When the Carpenters did not pursue the grievance or file an application claiming a sale of business, this would appear to be abandonment – However, the Board said it must weigh the entire context of the construction activity in 2005/2006: the Carpenters decided not to pursue their grievances because (a) the work was already largely being performed by their members through the sub-contractors; and (b) the Carpenters were pursuing province-wide bargaining rights in an ongoing sale of business application between the parties, involving other properties of RioCan, that would be determinative of the issue – Thus, the Board determined the Carpenters abandoned the grievances, but not their bargaining rights – The Board denied the Carpenters province-wide bargaining rights in 2010 – When construction work began again in 2013, they filed the present application – The Board found the Carpenters did not abandon bargaining rights by failing to pursue those rights prior to 2013, as there was no construction work being performed – The Board determined a sale of business had occurred within the meaning of the Act pursuant to s. 69, and declared the owners of the Mall bound to the Carpenters ICI Provincial Collective Agreement

BEFORE: *Matthew R. Wilson*, Vice-Chair

APPEARANCES: *D. Wray* and *Thomas Cardinal* appearing for the applicant; *Landon Young, Michael Connolly* and *Jonathon Gitlin* appearing for the responding party

DECISION OF THE BOARD: January 7, 2015

1. This is an application by the Carpenters' District Council of Ontario, Local 2486 ("the Carpenters") filed under sections 69 and 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended (the "Act") seeking declaratory relief alleging a sale of a business has taken place or the responding parties are a single employer for purposes of the Act.

2. The Carpenters assert that it had bargaining rights with Campeau Developments Limited ("Campeau") at the Timmins Square Mall ("the Mall") and, through various transactions, it maintained those bargaining rights until present. It seeks a declaration pursuant to s. 69 of the Act that it holds bargaining rights with RioCan Management Inc., Timmins Square Shopping Centre Inc. and 1451945 Ontario Limited. The Carpenters did not pursue any relief under s. 1(4) of the Act.

3. The responding parties acknowledge that the Carpenters held bargaining rights with Campeau. They also concede that a sale of the mall in 2001 from Cambridge Shopping Centres Limited ("Cambridge") to 1451945 Ontario Limited constituted a sale of business within the meaning of the Act. However, the responding parties take the position that the applicant abandoned its bargaining rights. They point to two periods where they say the bargaining rights were abandoned. First, they assert that the Carpenters' bargaining rights were abandoned prior to the legislative amendments in 1980. Second, if the Carpenters' bargaining rights survived, it is asserted that they were abandoned in 2005-2006 when a significant amount of construction work was performed on the mall and the Carpenters did not take any action to protect their bargaining rights.

4. The only issue is whether the Carpenters abandoned their bargaining rights prior to 1980, or, in the alternative, in 2005-2006.

BACKGROUND

5. There was no dispute about the corporate history of the Timmins Square Mall. In 1977, Campeau purchased 50% ownership in the mall with the other 50% owned by Uraeus Investments Limited ("Ureas"). In 1982, Ureas sold its ownership to Campeau who then sold the mall to Laing Property Corporation Limited in 1990. In 2000, the mall was sold to Cambridge Shopping Centres Limited ("Cambridge"). In 2001, the mall was sold to 1451945 Ontario Limited which is a company held by RioCan Real Estate Investment Trust ("RioCan") through a limited partnership. It then sold a 70% interest in the mall in 2003 to 3679462 Canada Inc., which was a subsidiary of CIBC Bank. In 2005, 3679462 Canada Inc. sold its interest to Montez (Timmins) Inc. who then sold its interest to Timmins Square Shopping Centre Inc.

6. The corporate structure of the two owners of Timmins Square mall at the time the application was filed - 1451945 Ontario Limited (30%) and Timmins Square Shopping Centre Inc. (70%) - requires a brief explanation. The corporate entities are at arms' length. Timmins Square Shopping Centre Inc. is a privately owned company and is best described as a passive owner. RioCan operates the mall through RioCan Management Inc. and invoices Timmins Square Shopping Centre Inc. for its services. Throughout this decision, I will refer to these entities as the responding parties.

7. In 2005, there was a substantial amount of construction work performed on the mall at an approximate cost of $5 million. The work, which took about one year to complete, was visible to the public as it involved construction on the exterior and interior of the mall. Much of the evidence called by the parties dealt with the details of this work.

THE EVIDENCE

8. I heard testimony from Mr. Michael Connelly, Senior Vice President of Construction for RioCan and Mr. Tom Cardinal, President of the Carpenters District Council and Manager of Northern Area.

Pre-1980

9. It was not disputed that the Carpenters obtained bargaining rights with Campeau at some point prior to 1980. I reviewed voluntary recognition agreements between Campeau and the Carpenters Local 397 in Oshawa dated April 7, 1970 and for Carpenters Local 249 in Kingston dated June 15, 1971. I reviewed a certificate issued by the Board certifying the Carpenters as the bargaining agent for all carpenters and carpenters' apprentices in the employ of Campeau in Toronto dated June 27, 1972. I also reviewed an accreditation order for the General Contractors' Section of the Toronto Construction Association and the Carpenters District Council of Toronto and Vicinity on Behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America and Heavy Construction Association of Toronto dated April 18, 1973.

10. When the Timmins Square Mall opened in 1976 or 1977, Campeau (the owner of the mall at the time) was not bound by the Carpenters' collective agreement in that Board Area. The Act was amended effective May 1, 1980, to extend existing bargaining rights on a province-wide basis. The implications of these amendments have been described by the Board in numerous decisions and I do not need to describe them any further (*see for example Inducon Construction (Northern) Inc., [1982] OLRB Rep. Mar. 390; Marineland, infra*). Suffice it to say that if the Carpenters did not abandon their bargaining rights prior to 1980, the impact of the legislative amendments was to expand the Carpenters' bargaining rights with Campeau on a province-wide basis.

11. There was no evidence of any remittances made by Campeau to the Carpenters at any time. There was no evidence that the collective agreements in Kingston or Oshawa were renewed or of any other union activity. It is equally important to point out that there was also no evidence of any construction work by Campeau that would be otherwise be performed by members of the Carpenters.

12. There was no evidence of any activity until the 2005-2006 construction work.

The 2005-2006 Construction Work

13. Mr. Connelly testified that prior to the 2005-2006 major construction work at the mall, RioCan had done some minor carpentry work that involved repairs and some work performed for tenants. He referred to it as landlord's work and said such work may be visible to the public. However, I did not hear any evidence about the specific details of such work or when or where the work was visible to the public.

14. Mr. Connelly testified that the only major construction work on the mall since the purchase in 2001 was done in 2005-2006. This work was reviewed in detail. It was undisputed that this work would have been visible to the public.

15. There were three main contractors responsible for the work on the mall, who, in turn, subcontracted out much of the work. I received copies of purchase orders for various subcontractors as well as the Job Cost Report prepared by Tribury Construction. Some of the work was performed by non-union contractors. It is not necessary for me to determine whether the non-union work was carpentry work (that might otherwise be covered by the Carpenters' collective agreement), since the majority of the carpentry work was performed by sub-contractors bound to the Carpenters' collective agreement who used the Carpenters' members.

16. To replace the roof over the Sears location, RioCan contracted with Blanchfield. In turn, Blanchfield subcontracted the parapet work to Prosperi who is bound by the Carpenters' collective agreement and used its members to perform the work.

17. RioCan also contracted with Tribury Construction for the work in the old Sears store. Tribury subcontracted the work to Lazer Precision and Leo Alarie and Sons Ltd. who were both bound by the Carpenters collective agreement and used its members for the work.

18. Interpaving was a third company contracted around the same time for construction work. This company was bound to the Carpenters' collective agreement and used its members for the work.

19. There was also a significant amount of carpentry work performed by Interior Technologies. This company is bound by the Carpenters' collective agreement and used members of the Carpenters to perform the work.

The 2005-2006 Correspondence

20. The Carpenters raised concerns about whether the work being done at the mall was covered by its collective agreement as early as April 2005.

21. In a letter dated April 28, 2005, the Carpenters wrote to Manorcore Group Inc., the company retained by Sears for the construction at the mall. The Carpenters asserted that the work being performed on the site was covered by its collective agreement. Mr. Connelly testified that a grievance was never filed since Manorcore was not unionized. But since Sears was bound to the Carpenters' agreement, Mr. Connelly testified that it was not unusual for the Carpenters to send such a letter to the non-union subcontractor.

22. On October 20, 2005, counsel for the Carpenters wrote to RioCan Real Estate Investment Trust claiming that the Carpenters held bargaining rights for all carpenters and carpenters apprentices of the owner of Timmins Square and asserted that RioCan was bound by the Carpenters Provincial Collective Agreement. It was alleged that certain exterior work was being performed at the mall in violation of the collective agreement.

Through the letter, the Carpenters filed a grievance alleging a breach of the collective agreement. After receiving the letter, Mr. Connolly contacted the mall manager and was led to believe that the Carpenters were questioning the work performed by two companies – Manorcore Construction and also Blanchfield Construction – on the roof of the building. Specifically, there was work being performed on the parapet on the roof of the Sears store.

23. In response to the Carpenters' grievance, counsel for RioCan wrote to the Carpenters on December 8, 2005 denying that it was bound to a collective agreement for work performed at the mall. RioCan explained that Manorcore Construction had been retained by Sears to perform construction work. RioCan retained Blanchfield Construction to perform the work on the roof of the Sears store. Counsel suggested that perhaps the grievance was more appropriate for Sears. Counsel also sought particulars of the grievance and proposed that the grievance be held in abeyance pending the disposition of the sale of business application in Board File No. 3081-99-R ("the RioCan-Burnac case").

24. At this time, RioCan and the Carpenters were involved in other litigation before the Board. Specifically, the Carpenters had filed an application pursuant to section 69 of the Act claiming that there was a sale of part of a business from Burnac Corporation and/or Burnac Leaseholds Limited to RioCan Real Estate Investment Trust. Through this application, the Carpenters were seeking a declaration that RioCan was bound to its Provincial Agreement. I will return to the implications of this litigation.

25. In response to RioCan's letter, counsel for the Carpenters sent a letter dated December 22, 2005 advising that the Carpenters were claiming bargaining rights for all work being performed by Tribury Construction, which related to work being performed to the construction and addition to the mall where the old Sears store was located. He advised that the Carpenters were relying on their historical bargaining rights commencing with Campeau Corporation as well as the sale of business that was the subject of Board File No. 3081-99-R. The Carpenters rejected the suggestion that the grievance be held in abeyance.

26. In a letter dated January 27, 2006 counsel for RioCan suggested that the Timmins Square Mall issue be heard with the "Cambrian Mall/Burnac transaction" because "…the nature of the claims or allegations…" were similar. By this, I take it to mean the litigation in Board File No. 3081-99-R. This suggestion was again rejected by the Carpenters in a letter from its counsel dated January 30, 2006.

27. In a follow up letter from counsel for RioCan that dealt with a number of issues related to the ongoing Board litigation, counsel stated that if the Carpenters intended to pursue its bargaining rights claim for Timmins Square mall, it ought to file "…another (similar) section 69 Application with the Board, in relation to the various transactions mentioned above, which, according to your letter, begin with Campeau."

28. Mr. Connelly testified that RioCan did not receive anything further from the Carpenters.

29. This was not the end of the matter as the Carpenters filed a grievance dated February 15, 2006. The grievance was addressed to "Timmins Square Shopping Centre" to the attention of Ms. Brenda Johnson who was the manager of the mall. The cover letter states:

> It has come to Local 2486 attention that the mall has contracted or subcontracted work to a company not bound by the Union's Provincial Collective Agreement. Therefore the union has no alternative but to file this grievance with the Ontario Labour Relations Board under section 133 of the "The ACT".

30. Although Mr. Connelly testified that he had not seen the grievance when it was sent to the mall, Ms. Johnson was the general manager for the property and the onsite person for RioCan. Ms. Johnson works for RioCan Management Inc., which is the property management company controlled by RioCan to operate the mall.

31. The grievance was not pursued by the Carpenters. Mr. Cardinal testified that when the Carpenters wrote to RioCan in 2005, Local 446 still existed and was pursuing its claim for province-wide bargaining rights before the Board. The letter to RioCan was written on behalf of Local 2486, that later merged with Local 446 in 2009. There was very little evidence on this merger and neither party referred to it in their closing submissions. However, Mr. Cardinal testified that the responsibility for Local 2486's claim for the bargaining rights was handled by Mr. Bud Calligan who was also responsible for handling Local 446's claim before the Board. According to Mr. Cardinal, since he was aware that most of the carpentry work at the mall was being performed by members of the Carpenters and the Carpenters were pursuing province-wide bargaining rights at the Board, there was no need to pursue the grievance filed on February 15, 2006. According to Mr. Cardinal, the final decision rested with Mr. Calligan who was responsible for overseeing the Carpenters pursuit of province-wide bargaining rights at the Board in the RioCan-Burnac case.

Events after 2013

32. There was no further correspondence from the Carpenters between 2006 and 2013 other than the events that were unfolding in the RioCan-Burnac case. It is worth repeating that the Carpenters were pursuing a remedy of province-wide bargaining rights that would have covered, if successful, the mall. This remedy was denied by the Board in 2010. The Carpenters filed an application for reconsideration.

33. The next time that the issue of bargaining rights was raised was in a letter from the Carpenters on June 21, 2013 where the Carpenters filed a grievance asserting that Laing Property Corporation and RioCan Real Estate Investment Trust violated the

collective agreement by failing "…to pay proper wages and related benefits and/or has failed to hire and/or subcontract in accordance with the collective agreement". This grievance and a subsequent application pursuant to s. 69 and/or 1(4) of the Act led to this proceeding. According to Mr. Connelly, the construction work performed in 2013 was the only time that substantial construction work had been performed since the 2005-2006 project.

34. Mr. Cardinal testified that following the remedial decision in the RioCan-Burnac case, the Carpenters did not pursue the bargaining rights for the Timmins Square mall since there was no construction work going on at the time. It was not until June 2013 when the Carpenters learned of construction work at the mall that it immediately filed a grievance to stake out its claim. It was never the Carpenters' intention to give up its bargaining rights, according to Mr. Cardinal.

The RioCan-Burnac case

35. In the RioCan-Burnac case, the Carpenters asserted that the sale of eleven commercial shopping centre properties, of which six were in Ontario, from Burnac Corporation and/or Burnac Leaseholds Limited ("Burnac") to RioCan Real Estate Investment Trust was a sale of business under the Act. The Carpenters claimed their bargaining rights with respect to the construction work transferred from Burnac to RioCan as a result of the sale.

36. The application was filed on January 17, 2000 and was protracted by the death of the vice chair hearing the case. The case was reheard by Vice-Chair Silverman who granted the Carpenters' application in a decision dated April 14, 2008. Vice-Chair Silverman remitted the issue of the appropriate remedy to the parties.

37. The parties were unable to agree on the remedy and appeared before Vice-Chair Silverman who issued a decision on April 28, 2010. In that decision, Vice-Chair Silverman denied the Carpenters' request for a declaration that RioCan was bound by the Provincial Agreement generally and, instead, declared that RioCan was bound by the Provincial Agreement for the six properties in Ontario that were the subject of the application. The Timmins Square Mall was not one of the six properties captured in the remedy.

POSITIONS OF THE PARTIES

38. The Carpenters rely on the bargaining rights that were established in the early 1970's and then expanded province-wide by the amendments to the Act in 1980. It argues that there was very little construction work on the Timmins Square Mall between 1980 and 2005 that would warrant any activity.

39. In 2005, the Carpenters set out its claim for the bargaining rights first to Manorcore (a non-union company subcontracted by Sears) and then to Rio Can Real

Estate Investment Trust. However, it explains that it decided not to pursue grievances because (a) the work was being performed by its members through the sub-contractors; and (b) the Carpenters were pursuing province-wide bargaining rights in the RioCan-Burnac case. The Carpenters argue that this is not evidence of abandonment. The Carpenters state that it is not seeking damages retroactively or province-wide bargaining rights for Rio-Can. Rather, it is seeking a declaration that 1451945 Ontario Limited, Timmins Square Shopping Centre Inc. and RioCan Management Inc. are bound to the Carpenters' agreement for the Timmins Square Mall location.

40. The Carpenters rely *Ellis-Don Ltd.*, [2012] OLRB Rep. January/February 131; *Ottawa Business Interiors Ltd.*, [2011] OLRB Rep. May/June 369; *Burling Ranger Co.*, [2007] OLRB Rep. January/ February 8; *Enka Contracting Ltd.*, [2004] OLRB Rep. September/October 926; *J & D Display & Interiors Ltd.*, [1998] OLRB Rep. March/April 217; *G.S. Wark*, [1996] OLRB Rep. September/ October 811; *PCL Constructors Eastern Inc.*, [1995] OLRB Rep. October 1277; *Toronto Dominion Bank*, [1995] OLRB Rep. May 686; *Associated Contracting Inc.*, [1994] OLRB Rep. August 951; *Elirpa Construction and Materials Limited*, [1994] OLRB Rep. April 372; *Hudson's Bay*, [1993] OLRB Rep. June 563; *Bancliffe Contracting & Construction*, [1992] OLRB Rep. September 990; *Ellis-Don Limited*, [1992] OLRB Rep. February 147; *Marineland of Canada Inc.*, [1990] OLRB Rep. December 1298.

41. The responding parties agree that the sale of the Timmins Square Mall in 2001 constitutes a sale of business within the meaning of the Act. It argues that the Carpenters abandoned their bargaining rights and therefore nothing results from the sale.

42. The responding parties submit that the Carpenters abandoned their bargaining rights prior to the 1980 amendments to the Act. They point to the absence of any union activity, including no remittance of dues or pension contributions, as support for its position. It also points out that there was no evidence that the collective agreements in Kingston or Oshawa were renewed. The absence of any union activity prior to 1980, and for the decades that followed, support its contention that the Carpenters' bargaining rights were abandoned prior to the amendments to the Act in 1980.

43. In the alternative, if the Carpenters' bargaining rights survived the period of inactivity and were expanded province-wide by the 1980 amendments to the Act, they were abandoned in 2005-2006 when there was substantial construction activity at the Timmins Square Mall. It pointed to the non-union work – that of Tribury Construction, Blanchfield Construction and others – that was performed in the public area, with the knowledge of the Carpenters, and never objected to. The responding parties assert that the Carpenters were aware that the work was being performed as non-union and it was incumbent on the Carpenters to take action to protect their bargaining rights. The failure to do so constitutes an abandonment of their bargaining rights.

44. The responding parties argue that it is not credible for the Carpenters to rely on the RioCan-Burnac case as any indication that they were attempting to protect their

bargaining rights since the Carpenters expressly rejected holding its grievance in abeyance pending the case. The Carpenters stated in its 2006 correspondence to RioCan that it intended to pursue the grievance for the Timmins Square Mall work. It did not and this is sufficient to conclude that it abandoned its bargaining rights.

45. The responding parties rely on *J.S. Mechanical v. U.A., Local 800* [1979] O.L.R.B. Rep. Feb. 110; *G.S. Wark Limited*, [1996] OLRB Rep. September/October 811; *Ameri-Cana Motel Ltd.*, [1989] OLRB Rep. 1009; *Burling Ranger Company Inc., a Subsidiary of Burling Ranger Company Limited*, 2007 CanLII 2101 (ON LRB); *Marineland of Canada Inc.*, [1990] OLRB Rep. December 1298.

Analysis

46. It was not contested that the sale of the mall in 2001 from Cambridge Shopping Centres Limited ("Cambridge") to 1451945 Ontario Limited constituted a sale of business within the meaning of the Act. There was no evidence that this sale was any different from previous transactions going back to 1977 when Campeau first purchased the mall. Thus, the Board declares that a sale of business occurred within the meaning of the Act. Additionally, the sale of 70% of the mall first to 3679462 Canada Inc. and then to Montez (Timmins) Inc. and then to Timmins Square Shopping Centre Inc. also constitutes a sale within the meaning of the Act.

47. The only issue for the Board to determine is whether the Carpenters abandoned the bargaining rights that were first obtained prior to 1980 when Campeau owned the mall. The Board explained the principle of abandonment and the underlying factors in *John Entwistle Construction Limited*, [1979] OLRB Rep. March 211:

> 10. The principle of abandonment of bargaining rights has been established for many years in the Board's jurisprudence. This principle finds expression in the expectation that a trade union, once it acquires bargaining rights by certification or voluntary recognition, actively will promote those rights. Conversely, failure to use the rights may result in the trade union's loss of them. See the Board's decision in *J. S. Mechanical*, Board File No. 1677-78-R (as yet unreported) at paragraph 4 for a comprehensive outline of Board cases dealing with this principle.
>
> 11. The issue of whether a trade union has abandoned its bargaining rights must be determined on the particular facts of each case. The Board has looked to a variety of factors in the bargaining relationship as indicators of whether bargaining rights have been abandoned. Some of these are canvassed in paragraph *5* of *J. S. Mechanical*, *supra* and include: the length of the union's inactivity: whether it has made attempts to

> negotiate a collective agreement or sought to administer an existing collective agreement: whether terms and conditions of employment have been changed by the employer without objection from the bargaining agent; and whether there are any extenuating circumstances which might explain an apparent failure to assert bargaining rights.

48. The onus is not on the union to demonstrate that it has not abandoned its bargaining rights. Rather, the Board has consistently held that the employer must prove that the union has abandoned a collective agreement or its bargaining rights (See *G.S. Wark*, *supra*; *Ellis-Don Limited supra*).

49. The Board has long recognized a presumption that trade unions do not voluntarily abandon bargaining rights. As noted by Adams J. (former Chair of the Board) in *Ellis-Don v. Ontario (Labour Relations Board)*, [1995] O.J. No. 3924 (Ont. Div. Ct.), aff'd (1998) 38 O.R. (2d) 737), aff'd [2001] 1 S.C.R. 221, the unlikely possibility of a trade union giving up its bargaining rights "…is reflected in the Board's jurisprudence and 'policy' which requires unequivocal evidence that a trade union has 'slept on its rights'...". It is for the employer to call unequivocal evidence to rebut the presumption.

50. The nature and quality of the evidence required to meet the onus was described in *Toronto Dominion Bank,* [1995] OLRB Rep. May 686 at paragraph 65:

> 65. In cases of abandonment the Board must start with the proposition that the union holds bargaining rights. … The focus then turns to whether there is compelling evidence that the union abandoned the rights it attained. That evidence could take any number of forms. The clearest form of evidence for example would be a written communication from the trade union to the employer that it no longer wished to represent the employees for whom it holds bargaining rights. In other instances, the evidence might be such that, notwithstanding that fact that there is not an express representation to that effect, the *conduct* or *affirmative actions* taken by the trade union are such that a reasonable inference can be drawn that the union abandoned its bargaining rights. Typically this is shown through evidence that the employer consistently performed work on a non-union basis, *and* the trade union knew or reasonably ought to have known of that fact. In either circumstance however the onus is on the employer which asserts abandonment to present clear and unambiguous evidence from which the Board can conclude or draw a reasonable inference that the trade union abandoned bargaining rights. The onus is not on the trade union to assert that it has affirmatively exercised its bargaining rights or has not abandoned them.

> Rather, unequivocal evidence which either points to actual abandonment or from which a reasonable inference can be drawn is required.

51. I am also mindful of the Board's jurisprudence on the principle of abandonment as it applies in the ICI sector. This was articulated in *G.S. Wark Limited*, *supra*:

> 11. Whether a trade union has abandoned bargaining rights is a question of fact which stands to be determined on the facts surrounding the issue in each particular case. Among the factors which the Board considers in determining an issue of abandonment are the length and degree of the trade union's inactivity, whether the trade union has attempted to negotiate or renew a collective agreement, whether terms and conditions of employment have been altered without the agreement or objection from the trade union, and the trade union's explanation for its conduct (or lack thereof). The quality of a trade union's representation will not, as such, be a relevant consideration, except to the extent that it may suggest abandonment. For example, complete inactivity and a refusal to respond to employee complaints indicates a poor quality of representation which may, in the context of the circumstances as a whole, and in the absence of a satisfactory explanation from the trade union, indicate abandonment.
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> 12. It is true, as Local 1 asserts, that the onus is on the parties asserting abandonment to establish it, and that the presumption is that trade unions do not voluntarily abandon bargaining rights (*Ellis-Don Limited,* [1992] OLRB Rep. Feb. 147: application for judicial review dismissed [1995] OLRB Rep. Dec. 1506, Ontario Court of Justice (General Division), Divisional Court).
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> 13. Notwithstanding the language used in some Board decisions, we respectfully suggest that it is inaccurate to say that "clear and cogent" evidence is required to establish abandonment, at least in the sense suggested by Local 1. First of all, the Board's factual determinations are always made on the balance of probabilities, while "clear and cogent", as argued by Local 1, suggests some higher test. Second, a common feature of abandonment cases is a less than satisfactory evidentiary foundation. It is not unusual, as in the case herein, for abandonment cases to deal with long periods of time for which there is little documentary evidence and where witnesses are either unavailable or have a very poor recollection of events.

Many abandonment cases have to be determined on the basis of inferences drawn from bits of documentary or other evidence which is available. Accordingly, what constitutes evidence of abandonment, and what evidence is sufficient to rebut the presumption against abandonment, will depend on the circumstances. Further, since the operative presumption is clearly rebuttable, the onus can shift to the trade union to explain its conduct (as it does when it comes to a consideration of automatic collective agreement renewal clauses, for example - see below).

14. Similarly, although a trade union's "intent" with respect to bargaining rights is a factor which the Board will consider, this intent must be discerned from the objective facts, and the reasonable inferences which can be drawn from those facts. The weight which is given to a trade union's subjective *ex post facto* expression of intent at a hearing when abandonment is raised will depend on the circumstances, but it will generally be given little weight unless there is something in the evidence before the Board which supports it, and it will not necessarily be determinative in any event.

15. Further, cases which involve the province-wide bargaining scheme in the ICI sector in the construction industry present particular difficulties. Many such cases, including this one, involve periods of time which both precede and follow the introduction of province-wide bargaining in 1978. At the very least, the Board will consider post-provincial bargaining conduct insofar as it may give an indication of whether the bargaining rights in issue were or were not abandoned prior to the introduction of provincial bargaining (*Marineland of Canada Inc.,* [1990] OLRB Rep. Dec. 1298). This does not mean that post-provincial bargaining conduct cannot be the basis for a finding of abandonment and it seems that a further clarification may be necessary in that respect.

16. It has been suggested that the Board's decisions in *Culliton Brothers Limited,* [1982] OLRB Rep. March 357 and *Lorne's Electric,* [1987] OLRB Rep. Nov. 1405 stand for the proposition that provincial bargaining rights in the ICI sector cannot be abandoned. We respectfully disagree. *In neither of those decisions did the Board say that the principle of abandonment does not apply to the province-wide bargaining scheme and provincial collective agreements in the ICI sector of the construction industry (Nor is it impossible for there to be*

> *abandonment of ICI bargaining rights. Consider the admittedly extreme example of an employee bargaining agency having the actual authority to do so, writing to an employer expressly stating that it and all of its affiliated bargaining agents are abandoning their ICI bargaining rights with respect to that employer.) Those decisions do no more than suggest that it is more difficult to establish abandonment in such circumstances because of the way bargaining rights are distributed under the Act, and the way that provincial agreements operate in the ICI sector. Further, to the extent that either of these decisions, or others, suggest that the conduct of an employee bargaining agency or an affiliated bargaining agent cannot weigh against other affiliated bargaining agents (or the employee bargaining agency; which in any case is always also an affiliated bargaining agent) for the purpose of determining whether bargaining rights have been abandoned we also respectfully disagree. It will not necessarily be the case that the conduct of one trade union entity will weigh against another related trade union entity in that respect, but it is not obvious why that could never be the case. Indeed, the conduct of other affiliated bargaining agents, or the employee bargaining agency which have had an opportunity to exercise bargaining rights may be symptomatic of abandonment, or not, as the case may be.*
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> . . .
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> 19. The Board rejects Local 1's submission that the agreement of the parties that Local 1 never intended to abandon the bargaining rights in issue is determinative of the abandonment issue. "Intent" is a fundamental part of the principle of abandonment, and it is inherent in the principle that a finding of abandonment depends upon a finding that the trade union intended to abandon its bargaining rights. But the intent which is important is the union's objective intent as demonstrated by its conduct during the relevant time period, and not its subjective intent as expressed after the fact when the union is responding to an assertion that it has abandoned its bargaining rights. That is, the question is: when viewed objectively, does the trade union's conduct demonstrate an intention to abandon bargaining rights?

52. The Board has held that a union is not required to actively pursue its bargaining rights during periods when the employer is not operating in the geographic scope of the collective agreement (See *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523 cited in *Steds Limited*, *supra*). While a union must actively promote its bargaining rights,

lengthy periods of inactivity by a company make the case for abandonment more difficult to establish when a union is similarly inactive during the same period.

53. I will now consider the application of these principles to the facts of the case.

Pre-1980

54. The evidence establishes that the Carpenters had been certified as the bargaining agent for Campeau prior to 1978. When province-wide bargaining rights in the ICI sector came into effect in 1978, Campeau became bound to the Carpenters provincial agreement, but only in the three geographic areas where they had bargaining rights.

55. Following amendments to the Act in 1980, Campeau became bound to the Carpenters province-wide. It is worth repeating that Campeau was the owner of the Timmins Square mall from 1977 to 1990. The mall was sold several times over the next two decades, but there was no evidence that there was construction work performed at the mall. In particular, there is no evidence that Campeau performed work or subcontracted work to a non-union subcontractor in the geographic areas where the Carpenters held bargaining rights that would warrant any activity from the Carpenters. Thus, it is not surprising that there is no evidence of remittances, deductions or other records prior to 1980. The absence of collective agreement renewals also does not establish abandonment since there was no activity at the time.

56. In the end, the Board is left with the inescapable conclusion that Campeau did not perform or subcontract out any work covered by the Carpenters' collective agreement in any of the three geographic areas where the union had bargaining rights and failed to enforce them.

57. I accept RioCan's argument, as supported by the Board's decision in *G.S. Wark*, *supra, and Marineland, supra*, that it is appropriate for the Board to examine the union's conduct after the legislative amendments in 1980 to determine whether there is a basis to conclude that the union has abandoned its bargaining rights.

58. From 1980 (when Campeau became bound to the Provincial Agreement) to 1990 (when it sold the Timmins Square Mall), there is no evidence it engaged in any construction activity, or failed to comply with the collective agreement, that warranted any activity by the Carpenters.

59. On October 17, 1991, when the Carpenters discovered that the mall had been sold, it wrote Laing Property Corporation, the new owners of the mall, and staked out its claim:

> My client has recently discovered that Laing Property Corporation has purchased Timmins Square from Campeau

> Corporation. My client and Campeau Corporation are bound by a collective agreement between the Carpenters' Employer Bargaining Agency (E.B.A.) and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (O.P.C.) covering Industrial, Commercial and Institutional construction work in the Province of Ontario. It is my client's position that by virtue of Section 63 of the Ontario Labour Relations Act Laing Property Corporation is now covered as well by the aforementioned collective agreement.

60. Although a grievance was not filed, and the Board has no evidence of what transpired following the correspondence, this type of communication supports the Carpenters contention that they had no intention of abandoning their bargaining rights.

61. Moreover, in the absence of any construction work that would be covered by the Carpenters' collective agreement, it is hard to see what the Carpenters could have done differently with regards to the Timmins Square Mall. Until 2005 there had been very little construction activity that would warrant involvement of the Carpenters.

The Construction Work of 2005-2006

62. RioCan argues that the period of 2005-2006 is the second period where the evidence supports that the Carpenters abandoned their bargaining rights. It asserts that the Carpenters were aware of the significant amount of construction work being performed at the Timmins Square Mall and decided not to pursue its bargaining rights.

63. The evidence establishes that the construction work performed between 2005 and 2006 at Timmins Square Mall was subcontracted to both union and non-union subcontractors. The Carpenters initially raised its objection in its letter to RioCan Real Estate Investment Trust on October 20, 2005 (also identified as a grievance), which was followed by an exchange of correspondence between the Carpenters and RioCan, including the filing of a grievance on February 15, 2006.

64. What to make of the correspondence between the parties in 2005 and 2006? It was clearly embedded in the ongoing litigation between the parties in the RioCan-Burnac case. That case was a sale of business application involving other properties of RioCan, but where the Carpenters were seeking province-wide bargaining rights. The Carpenters clearly raised its objection to the work being performed outside of the terms of the collective agreement. RioCan disputed the Carpenters assertions. There was no agreement on how to proceed.

65. I accept the Carpenters' evidence that there was a decision made at the provincial level of the Carpenters that bargaining rights were being pursued in the RioCan-Burnac case and that it would not pursue the grievances identified in the 2005-

2006 correspondence. In the Board's view, this is evidence that it abandoned the grievances, but not its bargaining rights.

66. With regards to the actual work being performed, I accept Mr. Cardinal's evidence that he visited the site at least once and was generally informed about what work was being performed. We know that RioCan contracted with Blanchfield to replace the roof on the Sears location and also contracted with Pro-Spec roofing for consultation on the project. Blanchfield subcontracted the parapet work to Prosperi who was bound by the Carpenters' collective agreement and used its members for the work. RioCan also contracted with Tribury Construction, who subcontracted the work to Lazer Precision and Leo Alarie and Sons Ltd. who are also both bound to the Carpenters collective agreement and used its members for the work. RioCan also contracted with Interpaving and this company was bound by the Carpenters' collective agreement and used its members for the work.

67. We also know that Sears contracted with Manorcore for the construction. Mr. Connelly testified that RioCan was not involved in this work.

68. The Carpenters did not pursue their grievance nor did they file an application claiming that a sale of business had occurred. If that were the end of the matter, it would appear on its face that the Carpenters abandoned their claim that they had bargaining rights at the Timmins Square Mall. However, that was not the end of the matter since two events were simultaneously unfolding. First, the Carpenters were pursuing province-wide bargaining rights before the Board in the RioCan-Burnac case. Had they been successful, Timmins Square Mall would not be an issue. Unfortunately, that proceeding took almost a decade to complete with the Carpenters' remedial relief being limited to six locations. It can hardly be said that the Carpenters abandoned their bargaining rights at the Timmins Square Mall when, at the same time, it was pursuing province-wide bargaining rights with the same company in a proceeding before the Board.

69. Second, as the Carpenters discovered in their investigation following the exchange of correspondence, much of the work being performed in 2005-2006 was being performed by their members through the work of the subcontractors. The Carpenters discovered, and it appears that the Provincial Council of the Carpenters decided, that there was no sense in pursuing the grievance against RioCan since the work was being performed by its members.

70. Although RioCan established that the Carpenters were aware that some of the construction work was performed using non-union trades, this does not, on its own, establish abandonment in light of the fact that the Carpenters were pursuing province-wide bargaining rights and were also aware that much of the work was being performed by its members. It certainly would affect any entitlement to damages since the Carpenters did not actively pursue the grievance. But that is a separate issue from abandonment of bargaining rights. The Board must weigh the entire context of the construction activity in 2005-2006 when considering the argument that the Carpenters

intended to abandon their bargaining rights. This point was made by the Board in *Marineland, supra:*

> As the question of whether abandonment has occurred is a question of fact, we must take into account all of the circumstances. See *Lorne's Electric*, (supra) for a discussion of the principles of abandonment. In this respect, we do not consider only the events between September, 1977 and March, 1978, in deciding whether abandonment had occurred by the latter date. Events occurring after March 3, 1978 can be relevant in assessing the meaning or effect of the union's inactivity before that date.

71. The entire context includes the litigation being pursued by the Carpenters before the Board in the RioCan-Burnac case. The scope of the remedy sought included the Timmins Square Mall. It is not abandonment when the Carpenters decided not to pursue the grievances filed in 2005-2006 after learning that much of the work was being done with its members and the ongoing litigation in the RioCan-Burnac case.

72. For these reasons, I am not convinced that the Carpenters intended to abandon their bargaining rights at the Timmins Square Mall.

73. The Carpenters seek a declaration that it holds bargaining rights with RioCan Management Inc., Timmins Square Shopping Centre Inc. and 1451945 Ontario Limited. As RioCan Management Inc. does not own the mall and was not involved in the sale, there is no legal basis for declaring it bound to the Carpenters ICI Provincial Collective Agreement. The owners of the mall are Timmins Square Shopping Centre Inc. (70%) and 1451945 Ontario Limited (30%). The Carpenters bargaining rights flowed to these two companies when the various transactions occurred.

74. Pursuant to s. 69 of the Act, the Board finds that a sale of business within the meaning of the Act has occurred and therefore declares that the Timmins Square Shopping Centre Inc. and 1451945 Ontario Limited are bound to the Carpenters ICI Provincial Collective Agreement.

3314-13-OH Paul LaPointe, Applicant v **SNC Lavalin Operations and Maintenance Inc.**, Responding Party

Delay – Discharge – Health and Safety – Practice and Procedure – Reprisal – An employee, L, claimed the termination of his employment constituted a reprisal for his exercise of rights under the Occupational Health and Safety Act – SNC brought a preliminary motion that the Board exercise its discretion to decline to inquire into the

application due to delay – Approximately one month after L's termination, L's counsel wrote to SNC alleging the discharge was a result of a workplace injury and a violation of the Human Rights Code because of L's age – An ESA claim was later filed, denied and appealed – In the course of proceedings related to the ESA appeal, L gained a better understanding of the various statutory regimes and filed the present application with the Board approximately 17 months after his termination – L asserted his initial notice to SNC of potential legal challenges to his termination rebutted any presumption of prejudice suffered by SNC due to delay –SNC asserted it suffered presumed and actual prejudice, and that L failed to provide a sufficient explanation for the delay – The Board's discretion to decline to inquire into a matter under section 50(3) of this Act is analogous to its discretion under section 96(4) of the Labour Relations Act and its approach is consistent – Where an application is filed more than six months after the events upon which it is grounded, the Board may decline to hear it where the responding party provides good reason why that should occur and the applicant does not provide a compelling explanation for the delay – Where an application is filed more than 12 months after the events upon which it is grounded, a presumption of prejudice arises and the applicant is required to rebut that presumption – Although SNC knew shortly after L's termination that L alleged his discharge was related to his age and to the fact that he had suffered a compensable workplace injury, those allegations are not actionable before the Board under either the ESA or the OHSA – There was no suggestion of reprisal until the present application was filed – SNC's approach to defending this application may or may not have been the same as its approach to proceedings in other forums, particularly because L's allegations were only ever raised in a forum (a claim under the ESA) where there was clearly no jurisdiction to entertain them – Further, where an applicant has proceeded in multiple forums the Board has often found such conduct favours declining to inquire into the matter so as not to encourage parties to engage in forum shopping – The Board could not determine that SNC's ability to defend the application had not been impaired – Further, in assessing prejudice the Board also considers how the impact of the requested relief has been affected by the delay and whether the employer has already had to defend its actions in other proceedings – The Board determined L had not rebutted the presumption of prejudice – Application dismissed

BEFORE: *Mary Anne McKellar*, Vice Chair

DECISION OF THE BOARD: February 4, 2015

Introduction

1. This is an application alleging a contravention of section 50 of the *Occupational Health and Safety Act* ("the Act").

2. The responding party ("the Employer") terminated the applicant's employment on October 1, 2012.

3. This application was filed with the Board on March 3, 2014. In it the applicant claims that his termination was a reprisal for his exercise of rights under the Act. He seeks to be reinstated to employment with compensation for lost wages.

4. The Employer has made a preliminary motion that the Board exercise its discretion to decline to inquire into this application.

The Facts of this Case

5. The applicant's employment with the Employer commenced on April 26, 2009 and ended on October 1, 2012 when his employment was terminated. The applicant was paid termination pay in lieu of notice in accordance with the *Employment Standards Act, 2000*, ("the ESA") (albeit paid out at a later date than it ought to have been) but declined to sign a release that would have provided him with an additional payment.

6. On October 30, 2012, counsel for the applicant wrote to the Employer alleging that the applicant's termination was "as a result of a workplace injury that he sustained in January 2012", and constituted a contravention of the *Human Rights Code* ("the Code"), for which a civil action might be commenced. The applicant proposed that the matter could be resolved for an amount equivalent to seven months wages. In January 2013, the Employer declined to accept the applicant's proposed terms, but reiterated its offer to pay certain additional monies on execution of a release.

7. It appears that the applicant never commenced a civil action. Nor did he file a complaint under the Code. The presumptive time limit for filing a Code complaint (6 months after the last incident complained of) would have expired on or about April 2, 2013.

8. On May 11, 2013, the applicant filed a claim under the ESA with the Employment Practices Branch ("EPB") of the Ministry of Labour. Although the actual claims filed are not usually shared by the EPB with the party against whom they are made, it appears that this Employer did contemporaneously receive a copy of the claim. In any event, the applicant identified in the following paragraph what prompted him to file the claim:

> [sic]
> I would like to obtain the reason for my dismissal as it was an unlawful dismissal without any reasons or advanced notice. Was unfairly treated after a work accident, and my age (60) Was harrassed in order to force me to leave the company. Did not agree with certain work procedures asking me to do tasks outside of my qualifications and TSSA regulations. Was also a witness to certain health & safety situation in the building I worked in.

9. The Employment Standards Officer ("ESO") assigned to investigate the applicant's claim advised the applicant by letter dated August 2, 2013, that she found no contravention of the ESA. The narrative report accompanying the decision letter deals only with whether unpaid wages, including termination and severance pay were owing to the applicant. It notes that such amounts as were owing had been paid to the applicant, although not within the timeframe set out in the Act. On September 4, 2013, the applicant filed an application for review with the Board under section 116 of the ESA. He appended 9 pages of typed particulars to his application. The bulk of them relate to his workplace injury and the aftermath. There are a few entries that outline his dispute with the Employer about tasks he was faulted for not doing, but which he says were done in the past by tradesmen with different qualifications, and which he says he did not think his qualifications permitted him to do, and adverts to the fact that he sought information from TSSA in that regard. No mention is made of what the TSSA's response to his inquiry was. In any event, the applicant concludes as follows in his particulars:

> The letter dismissing me doesn't inform me as to the reason. When I was asked about the reason later by the CEC process, I mentioned this problem with my back from the work-accident as one of the reasons why they probably dismissed me, and that I had heard from other SNC employees that if you are older and have a problem with your back esp. from an accident, the company are well known to try from then on, to get rid of you. "They're going to try to pressure you to quit; don't!" I was told by a fellow employee at his house. Essentially he cautioned me to not give in to this pressure, but that apparently SNC will lose 'bonus-points' (on their contract with Public Works) when there are work accidents.

10. In accordance with the Board's usual practice, a Labour Relations Officer ("LRO") was assigned to meet with the parties and endeavour to settle the application. In the course of the LRO's involvement with the file in January 2014, the applicant says he discovered that he ought to have proceeded under this Act rather than the ESA to advance his claim against the Employer.

11. The applicant filed this application on March 3, 2014. He did not, however, withdraw his application for review under the ESA, and it was heard by the Board on June 12, 2014, and dismissed by decision dated June 25, 2014. From the reasons, it appears that the applicant at the hearing pursued a single issue, his request that the Board issue a Notice of Contravention (and monetary penalty) against the Employer for not having paid him his termination pay in a timely way. Such penalty is not payable to an employee. In other words, the applicant did not pursue any personal remedy in the ESA application.

12. In this application, the applicant makes the following assertions about the actions he took that he says fall within the sphere of activity protected from reprisal under section 50:

> [TRANSLATION]
> 13. On a number of occasions during the summer of 2012, the Applicant informed his superiors about some concerns with regard to health and safety in the workplace.
>
> 14. The Applicant was concerned about the fact that his superiors were asking him to perform tasks for which he was not qualified and that could place his health and safety, and that of his colleagues and the public, at risk.
>
> 15. In particular, he complained that his superiors were asking him to carry out inspections on building equipment that were beyond his abilities. They were also asking him to dispose of ballasts for fluorescent neon lights, even though he had not received the instructions and training necessary for doing so.
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> 16. The Applicant did not receive an adequate response from his superiors or from the Responding Party.
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> 17. On September 9, 2012, the Applicant took the initiative and wrote an email to his team leader, Philip Thibeault, with a copy to his superior, Dan Meunier, informing him that, with respect to the semi-annual, annual and three-year inspections of the "CMMs", he did not feel qualified to carry out those tasks, and that as a Technician II, [TRANSLATION] "he must, for reasons involving health and safety in the workplace, refuse to perform those tasks." (Exhibit 6)

13. The applicant asserts that the Employer has contravened the Act and makes the following remedial requests:

> [TRANSLATION]
> 31. In this case, the Applicant argues that the Responding Party did not take all the reasonable precautions in the circumstances to protect him, in accordance with subparagraph 25(2)(h) of the *Occupational Health and Safety Act*, R.S.O. 1990 "OHSA".
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> 32. The Applicant also argues that the Responding Party did not comply with the prescriptions of section 43 of the OHSA following his refusal to work as stated on September 9, 2012.

> 33. Finally, the Applicant argues that the disciplinary measure taken on September 24, 2012 and his subsequent dismissal by the Responding Party were the direct result of the fact that he was attempting to enforce his rights under the OHSA.
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> 34. Mr. LaPointe is seeking the following conclusions: an amount equivalent to his loss of income since the date of his dismissal, his immediate reinstatement in his position and payment of $10,000 in general damages.
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> 35. In the alternative, should the Board not conclude that there has been a violation of subsection 50(1) of the OHSA, the Applicant pleads that it should nonetheless exercise its discretion under subsection 50(7), since his dismissal was not justified or reasonable in the circumstances.

The Parties' Positions on this Motion

14. The parties exchanged written submissions on the preliminary motion. They also filed extensive case law. Although I have reviewed it all, I do not find it necessary to refer to most of it, for reasons which will become clear later in this decision.

15. The applicant summarized its position as follows:

> 1) The employer was given sufficient notice of the Applicant's legal challenge to his termination, and thus, the presumption of prejudice has been rebutted;
>
> 2) The employer has failed to demonstrate any actual prejudice arising from the apparent delay and, if any such prejudice exists, the employer is the author of its own misfortune;
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> 3) The applicant was reasonably diligent in attempting to challenge the employer's alleged reprisal against him; and
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> 4) In light of the above, a large and liberal interpretation of the OHSA in favour of the worker should prevail.

16. The Employer's overall response to this summary is the following:

> 2. The Applicant has attempted to circumvent the Board's established jurisprudence on the issue of undue delay by relying heavily on court decisions which have limited applicability to

> the case at hand and which, if fully and properly considered, in fact support SNC-Lavalin's position. The Applicant has also attempted to improperly place the onus on SNC-Lavalin to explain why the Application should not be heard, notwithstanding the presumed and actual prejudice SNC-Lavalin would suffer. The Applicant has failed to explain his delay in filing the Application other than to suggest that he received legal advice and chose to pursue a different forum for relief thereafter, after some confusion. The Board has held that this is not a sufficient explanation for delay.
>
> 3. SNC-Lavalin therefore submits that the Application should be dismissed for undue delay. . . .

Analysis

17. The only issue before the Board on the merits of this case can be succinctly summarized: was the applicant's employment terminated because he engaged in a protected activity under the Act?

18. This is not a section 61 appeal. Whether the Employer complied with the substantive requirements of the Act (or its regulations) is simply not in issue. The applicant's allegations respecting non-compliance with section 25(2)(h) do not form a proper part of this application.

19. Section 50 of the Act does not specify a time limit within which complaints of its contravention must be filed.

20. There is therefore no part of this application, and certainly not of this motion, that requires any section of the Act to be interpreted at all. The applicant's submissions and case law to the effect that the Act must be given a large and liberal interpretation are not pertinent. I will say no more about them.

21. This motion is about whether the Board should exercise its discretion to decline to inquire into the merits of this matter. Section 50(3) provides the Board with such discretion:

> 50(3) The Board may inquire into any complaint filed under subsection (2) or referral made under subsection (2.1) and section 96 of the *Labour Relations Act, 1995*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

22. The discretion conferred on the Board under section 50(3) is analogous to the discretion it enjoys under section 96(4) of the *Labour Relations Act, 1995* ("the LRA"),

and the Board's approach to its exercise has been consistent with the case law developed under the LRA. See *1469539 Ontario Ltd.*, 2005 CanLII 337 (ON LRB) and *David Gazit*, [1996] OLRB Rep. July/August 635, O.L.R.D. No. 2832.

23. There are many factors that may cause the Board to exercise its discretion not to inquire into a complaint. They include situations where: the dispute between the parties has become moot; the matter has been adjudicated in another (or several other) proceedings; and/or the responding party has suffered prejudice because of the time that has elapsed between when the applicant became aware of the harm he has allegedly suffered through the actions of the responding party and when he filed his complaint.

24. Conversely, and not surprisingly, the Board does not exercise its discretion to decline to inquire into a complaint that the responding party has encouraged the applicant to bring to the Board (see *Graphite Specialty Products Inc.* 2008 CanLII 4600 (ON LRB)).

25. Some of the cases filed with me deal with when an aggrieved party can be said to have reasonably discovered that he has a complaint against a responding party. I do not understand the applicant to be taking the position that he did not discover he had a claim against the Employer until some time after his termination. Rather, I understand that he has taken the position from the outset that his employment was terminated for reasons other than his performance. All the facts that ground his complaint under the Act have been known to him from the time of his termination on October 1, 2012. What he asserts that he did not understand or appreciate until more recently is what statutory regime had jurisdiction to deal with that complaint.

26. The Board does not merely calculate the time that has passed between when the applicant became aware of the facts pertaining to the last incident he or she complains of and the filing of the application, and dismiss an application where it exceeds some pre-determined length of time. Instead, the Board assesses the impact of the delay between the last event complained of and the date the application was filed. In assessing that impact, the Board makes certain rebuttable presumptions about prejudice, and the party that bears the obligation of rebutting the presumption changes depending on the magnitude of the delay. Where an application challenging an employee's termination (or dealing with some other dynamic workplace situation) is filed more than 6 months after the events upon which it is grounded, the Board may decline to hear it where the responding party provides it with a good reason why that should occur, and the applicant does not provide a compelling explanation for the delay. Where the application is filed more than 12 months after the events upon which it is grounded, the Board will presume that the responding party has been prejudiced, and the applicant will be required to rebut that presumption. See *Chrysler Canada Ltd.*, [1997] O.L.R.D. No. 2605, at ¶14:

> 14. But speed is not the only objective, and justice and fairness require that someone who may be aggrieved have a reasonable opportunity to recognize this, to formulate a position

> and plan of action, seek legal advice or representation, and to actually plead and file a complaint. While there is no fixed rule, in cases which involve a loss of employment (particularly in an economy in which jobs are hard to come by), the rule of thumb developed by the Board is that it will generally not dismiss a complaint which makes out a *prima facie* case on the basis of delay which is less than one year long, except where a responding party demonstrates actual prejudice and there is no satisfactory explanation for the delay. As a general matter, where the delay asserted is less than one year, the onus is on the responding party to demonstrate actual prejudice (or perhaps some other good reason) sufficient to justify dismissing a complaint without a hearing on its merits. But where the delay is more than one year, the onus is on the applicant to provide a satisfactory explanation for it. At that point it becomes incumbent upon an applicant to provide a good reason for the Board to exercise its discretion in favour of entertaining the application or complaint.

27. The above approach has been consistently followed by the Board in considering whether to exercise its discretion to decline to inquire into the merits of a complaint on the grounds of delay. The results in individual cases have, of course, varied depending on the facts, but the approach has been consistent. Applied to this case it would mean that the applicant must rebut the presumption that the responding party has suffered prejudice as a consequence of his filing the application 17 months after his employment was terminated.

28. The applicant has relied on a number of court decisions that he says support the principle that the better or more "modern" approach is that the respondent should have to demonstrate prejudice. He also relies on some cases that appear to stand for the proposition that a client should not be disadvantaged and lose his cause of action because of the conduct of his counsel. All of the cases deal with parties who have missed prescribed limitation periods for commencing actions or prescribed time limits set in rules of procedure for taking some step in that action or in filing or perfecting an appeal. These cases are not binding on the Board and its approach to an exercise of discretion. Further, I do not think the cases cited support the first proposition, and I fail to see how the second is pertinent on the facts of this case.

29. As noted above, some of the decisions deal with appeals, not originating processes, and with a failure to comply with technical requirements for perfecting them with the relevant court after the responding party had been served with the appeal. These cases arose in Quebec, and the judgments note the absence of any prejudice to the responding party. (See *Québec (Communauté Urbaine) v. Services de santé du Québec* 1992 CanLII 122 (SCC), *St. Hilaire et al v. Begin*, [1981] 2 S.C.R. 79). Another (*Finlay v Van Paassen* (2010), 101 O.R. 3(d) 390; 2010 ONCA 204 (CanLII)) deals with a

request to set aside the dismissal of an action, where notice of intent to dismiss was not delivered, but where the motion was not brought in a timely way. The Court notes that there was a complete absence of prejudice to the defendant who was already defending another claim arising out of the same circumstances. Only two cases actually deal with which party bears the onus with respect to the question of prejudice, and both say that the *legal onus* to establish that the defendant would suffer no prejudice rests with the party who seeks to commence an originating process after the expiry of a limitation period: see *Deaville v Boegeman* 1984 CanLII 1925 (ON CA), and *Chiarelli v Wiens* 2000 CanLII 3904 (ON CA). The second case does add the caveat that the defendant in such circumstances has an *evidentiary onus* "to provide some details of prejudice".

30. In the Board's case law, prejudice takes many forms:

a) The passage of time has had a deleterious effect on the responding party's ability to defend against the complaint;

b) The requested relief would involve either a substantial measure of retrospective financial liability, and/or would cause disruption to now established relationships in the workplace. See *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, 1982 CanLII 864, at ¶25; *John Kohut,* [1991] OLRB Rep. Dec. 1367, 1991 CanLII 6154 at ¶42; *Raymond Downer* 2012 CanLII 4264 (ON LRB); and *Garland v USW, L. 1-1000* 2012 CarswellOnt 9985 (ON LRB).

c) The responding party has already had to defend its actions in the context of other proceedings in which the applicant sought relief (or relief was sought on his behalf) arising out of the same events. See *Corporation of the City of Mississauga,* at ¶35; *Concrete Construction Supplies* 1982 CanLII 1017 (ON LRB) at ¶28; *David Gazit* at ¶33; *Chrysler Canada Ltd.,* at ¶24; *National Hockey League* 2014 CanLII 33508 (ON LRB) at ¶35.

31. The applicant's submissions address only the first aspect of prejudice above. On this point, he essentially says that the Employer knew almost immediately that he was challenging his termination and ought at the time to have investigated and preserved evidence from those persons who knew why that decision had been made.

32. I agree that the Employer knew pretty much contemporaneously with the termination that the applicant was not pleased about it, and that he suspected it had occurred for other than performance-related issues. Specifically, however, he alleged at the time and again in his ESA claim and application for review, that he thought he was selected for termination because he was an older worker who had suffered a compensable

workplace injury. Those allegations are legally actionable, but not before this Board, and certainly not under the ESA.

33. Until this application was filed in March 2014, approximately 17 months after the applicant's termination of employment, there was no suggestion that the circumstances of the applicant's termination amounted to a reprisal under this Act. What he may or may not have done to enforce this Act would not have been facts the Employer would necessarily have gathered to defend against an allegation that he was dismissed contrary to the *Human Rights Code*, because of his age or disability, particularly when that allegation was only ever raised in a forum (a claim under the ESA) where there was clearly no jurisdiction to entertain it.

34. In short, even if prejudice were only measured as involving a deleterious effect on the ability to defend against a complaint, I am unable to conclude that the Employer's ability to investigate promptly and defend this matter has not been impaired, nor that any failure to investigate is the Employer's own fault. Here is what the Employer has said about this aspect of the case:

> 16. (iv) While the Applicant states that his supervisor, Mr. Daniel Meunier, has remained involved in the Applicant's claims, Mr. Meunier is only one of several potential witnesses. There are many other potential witnesses who would have knowledge of the termination of the Applicant's employment. This includes not only SNC-Lavalin's employees, but other potential witnesses including clients and contractors for example who had witnessed and reported the Applicant's job performance issues to SNC-Lavalin. None of these potential witnesses have yet been involved in the ESA complaint.

35. The facts of this case are clearly distinguishable from *Extendicare (Canada) Inc. (c.o.b. Laurier Manor)* 2007 CanLII 23899 (ON LRB). There the applicant's employment was terminated in August 2004 and a grievance was filed. The grievance alleged the termination was a reprisal for the applicant's having raised concerns about health and safety issues arising from the design of certain workstations. After the union advised the applicant in July 2005 that it would not pursue the grievance, he filed a duty of fair representation complaint against the union. When that was dismissed in April 2006, he filed a section 50 complaint against his employer at the beginning of November 2006. The allegations were the same ones made in the grievance process. The Board declined to dismiss the application.

36. In his submissions, the applicant has not directly addressed the other factors the Board has considered under the rubric of prejudice. He has adverted to the other legal proceedings he has either proposed to commence or actually commenced in support of the assertion that the Employer has not been prejudiced in its ability to defend against this claim, and I have addressed that submission above. It must be noted, however, that where

an applicant has proceeded in multiple forums, the Board has more often than not found that such conduct favours declining to inquire into the matter because the Board is concerned not to encourage parties to engage in forum shopping. See the comments in *David Gazit*, *Gurnum Dhanota* and *Concrete Construction Supplies*.

37. The Employer has said that if this complaint is dealt with on its merits, it will not merely suffer prejudice in its ability to defend against this application. The additional prejudice is identified as the following:

> 16. As described in SNC-Lavalin's first written submissions, the company will suffer significant prejudice if the Application proceeds on its merits. The prejudice to SNC-Lavalin includes but is not limited to:
>
> > (i) Having to participate in a second round of litigation, resulting in further significant expenditure of time, resources, and energy of management;
> >
> > (ii) The Applicant seeks lost salary from the date of dismissal (over two years to date), resulting in significant potential financial liability. This is a significant factor the Board has considered in the past in finding prejudice; [*Corporation of the City of Mississauga*, 1982 CanLII 864 (ON LRB), at para 22.]
> >
> > (iii) The Applicant seeks reinstatement. The Applicant has been replaced by a full-time permanent employee. He seeks a remedy that would significantly disturb the workplace and would result in prejudice to SNC-Lavalin and several affected employees. Had the Applicant promptly filed his Application, SNC-Lavalin could have taken alternate steps including not hiring a replacement employee until the Application was dealt with. The Applicant would also need to be retrained; . . .

38. In summary, whether to dismiss this application because it was filed 17 months after the applicant's employment was terminated, involves primarily an assessment of whether the Employer would suffer prejudice should the Board deal with the matter on its merits. On the approach the Board has always adopted on this issue, it is up to the applicant to rebut the presumption of prejudice. I do not need to decide whether or not the Employer also has an obligation to provide details of the prejudice it claims, because this Employer has done so. In assessing prejudice, the Board considers more than simply how a delay has affected the responding party's ability to defend against a complaint. It considers as well how the impact of the requested relief has been affected by the delay, and whether the Employer has already had to defend its actions against the claims of the

applicant in other proceedings. Taking account of all of these factors, I find that the applicant has not rebutted presumption of prejudice.

Decision

39. For all of the above reasons, I am exercising my discretion under section 50(3) of the Act to decline to inquire into this application.

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